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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY, APPELLANT,

vs.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED SEPTEMBER 23, 1937.

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[fol. 1]

IN SUPREME COURT OF PENNSYLVANIA

MAY TERM, 1937

No. 35

COMMONWEALTH OF PENNSYLVANIA, Plaintiff,

vs.

SCHUYLKILL TRUST COMPANY, Defendant

DOCKET ENTRIES

Appeal of Defendant, No. 61, Commonwealth Docket, 1933, from the Final Judgment

Appeal from the Court of Common Pleas of the County of Dauphin

Filed February 8, 1937

Eo die certiorari exit.
Returnable 21st Monday of the year 1937.

Feb. 24, 1937. Notice of appeal, etc., filed.
May 18, 1937. Assignments of error filed.
May 20, 1937. Record returned and filed.
May 26, 1937. Argued.

JUDGMENT

Jun. 25, 1937. Judgment affirmed.

Opinion by Stern, J.

Jul. 2, 1937. Petition for re-argument filed at Philadelphia.
John Robert Jones, Atty.

ORDER REFUSING RE-ARGUMENT

July 9, 1937. Re-argument refused.

Per Curiam

Jul. 12, 1937. Petition to retain record for three months filed at Philadelphia.

John Robert Jones, Atty.

[fol. 2] July 12, 1937, Petition granted.

Per Curiam.

Aug. 24, 1937. Notice required by Rule 12, Sec. 2, of the Supreme Court of the United States, filed and service thereon accepted by Charles J. Margiotti, Atty. Gen'l, Com. of Pa.

Aug. 31, 1937. Petition for appeal to Supreme Court of the United States filed showing the following order endorsed thereon: "And now, August 20th, 1937, upon consideration of the within petition, an appeal is allowed in the within cause; bond to be filed for costs in the sum of $200.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States."

Aug. 31, 1937. Statement as to jurisdiction filed.

Aug. 31, 1937. Bond in sum of $200—approved by Mr. Justice Roberts, filed.

Aug. 31, 1937. Citation from Hon. Owen J. Roberts, Associate Justice of the Supreme Court of the United States and service thereon accepted by Charles J. Margiotti, Atty. Gen'l of Pennsylvania, filed.

Aug. 31, 1937. Stipulation and praecipe for transcript of record filed.

John Robert Jones, Charles J. Margiotti, Atty. Gen'l, Attorneys.

[fol. 3] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

DOCKET ENTRIES

Appeal from the decision of the Board of Finance and Revenue, tax on shares ending December 31, 1930.

March 25, 1933. Appeal and specifications of objections filed.

April 6, 1933. Approved bond filed.

July 18, 1933. Stipulation to try without jury filed.

October 7, 1933. Supplemental stipulation of facts filed.

October 14, 1933. Defendant's Requests for Conclusions of Law, with answers thereto filed.

October 19, 1933. Statement of Counsel filed.

October 19, 1933. Stipulation of Facts filed.

JUDGMENT

October 19, 1933. Judgment is hereby directed to be entered in favor of the Commonwealth and against Schuylkill Trust Company for the sum of $1,863.17 unless exceptions be filed within the time limited by law. See opinion filed.

November 17, 1933. Exceptions of the defendant filed.

November 22, 1933. Opinion of court filed modifying Exception No. 20 and Exception No. 29. Each of the remaining exceptions are overruled and judgment is directed to be entered as directed in the original opinion filed dated Oct. 16, 1933. See opinion filed.

November 24, 1933. Supplemental order to opinion filed modifying said opinion and overruling all exceptions in- [fol. 4] cluding the Exceptions No. 20 and 29, Same day final order shows that all exceptions are overruled. See supplemental order filed.

December 19, 1933. Certiorari sur appeal to the Supreme Court No. 19, May Term, 1934 filed.

June 30, 1934. Assignments of Error overruled and judgment affirmed per Frazer, C. J.

December 14, 1934. Appeal to the Supreme Court of the United States allowed.

January 28, 1936. Remittitur from Supreme Court filed certifying that the judgment of our court was affirmed and on appeal to the Supreme Court of the United States, the same was reversed, with costs as per mandate of said Supreme Court of the United States attached.

February 11, 1936. On petition filed Rule granted on defendant to show cause why judgment should not be entered in accordance with the above petition. Returnable 15 days filed.

February 18, 1936. Issuance of Rule waived and service accepted by J. R. Jones, Attorney for Defendant.

February 25, 1936. Demurrer of Schuylkill Trust Company to petition of Commonwealth filed.

JUDGMENT

April 20, 1936. For reasons given in opinion heretofore filed in case No. 162 C. D. 1933, judgment is directed to be entered in favor of the Commonwealth of Pennsylvania and against defendant in the sum of $1801.03 less the allowance of costs to defendant of $344 fixed by the mandate of the Su-

preme Court of the United States unless exceptions be filed [fol. 5] within time limited by law.

April 24, 1936. Opinion filed.

May 8, 1936. Defendant's exceptions to findings, conclusions of law and judgment directed by the court filed.

May 14, 1936. Exceptions of Commonwealth to opinion and judgment filed.

May 19, 1936. Additional exceptions of defendant filed.

JUDGMENT

January 18, 1937. The judgment is directed to be entered in favor of plaintiff and against defendant in the sum of $1375.45. See opinion filed.

JUDGMENT

January 22, 1937. Each of the 41 exceptions are overruled except numbers 21, 22, 23, 29 and 38 which are sustained. The judgment is modified in accordance with and for the reasons given in our opinion upon exceptions filed January 18, 1937. The judgment entered January 18, 1937 is hereby overruled and final judgment is directed to be entered in favor of the Commonwealth and against defendant in the sum of $1441.39. See opinion filed.

January 22, 1937. All the exceptions other than 14 and 15 are overruled as opinion of this date see file.

February 8, 1937. Certiorari sur appeal No. 35 May Term 1937 from Supreme Court filed.

March 4, 1937. Certiorari sur appeal No. 36 May Term 1937 from Supreme Court filed.

[fol. 6] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

APPEAL AND SPECIFICATION OF OBJECTIONS

In the Matter of the Account for "Tax on Shares" for the year ending December 31, 1930 amounting to $2,306.08 upon a "Taxable Value of Shares" in the amount of $461,216 at the rate of five mills settled against the Schuylkill Trust Company, Pottsville, Pennsylvania, by the Department of Revenue January 25, 1932 and approved by the Department of the Auditor General January

26, 1932, the Petition for Resettlement of which was refused by the Department of Revenue and the Department of the Auditor General October 21, 1932, which, upon Petition for the review of the said action taken by Department of Revenue and approved by the Department of the Auditor General, was resettled by the Board of Finance and Revenue January 26, 1933, by which resettlement tax was settled against the said Schuylkill Trust Company for the year ending December 31, 1930 in the amount of $2,290.14 upon a "Taxable Value of Shares" in the amount of $458,028, a certification of the action of the said Board of Finance and Revenue and a copy of the said Account showing the amount due as the result of the said action of the Board of Finance and Revenue being hereunto attached.

The Schuylkill Trust Company, Pottsville, Pennsylvania, hereby appeals from the said resettlement of its account by the said Board of Finance and Revenue made January 26, 1933, to the Court of Common Pleas of Dauphin County, and files the following specification of objections thereto, [fol. 7] agreeably to the provisions of the Act of Assembly in such cases made and provided:

I. That the said resettlement of tax as aforesaid is erroneous, illegal and void in the following particulars, to wit:

1. That in the determination of the said taxable value of the shares in the amount of $458,028 the fiscal officers of the Commonwealth considered and included the following United States Securities of the market value of $134,907, Fourth Liberty Loan Bonds 4¼s, of the market value of $103,500, Fourth Liberty 4¼s, of the market value of $2,742, U. S. Treasury 4s of 1954, of the market value of $17,465 and U. S. Treasury 3½s Ser. A., Mar. 1932, of the market value of $11,200. Such consideration and inclusion were erroneous, illegal and void for the reason that thereby such United States securities are subjected to tax by the Commonwealth of Pennsylvania. These securities are exempt from taxation under Clause 2 of Section 8 of Article I of the Constitution of United States and Section 3701 Revised Statutes, 31 U. S. C., Section 742, and their consideration and inclusion in determining the taxable value of the shares of stock of the appellant constitute a violation of Clause 2

of Section 8 of Article I of the Constitution of the United States, said Section 3701 Revised Statutes of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment [fol. 8] to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it the equal protection of the laws.

2. That in the determination of the said taxable value of the shares in the amount of $458,028 the fiscal officers of the Commonwealth considered and included the following bonds of the market value of $10,900, Philippine Islands 5½% Public Improvement Loan due Aug. 1, 1941, Act of Philippine Legislature Number 2940, bonds. Such consideration and inclusion were erroneous, illegal and void for the reason that these bonds were issued under the provisions of the Act of Congress of August 29, 1916, Act of Congress July 21, 1921 and Act of the Philippine Legislature Number 2940 approved February 5, 1921 and were exempted from taxation under the provisions of the Act of Congress of February 6, 1905, Chap. 453, Vol. 33, U. S. Statutes at Large, part 1, page 689. The consideration and inclusion of the said bonds in the determination of the taxable value of the shares of stock of the appellant constitute a taxation of the said bonds and therefore the resettlement made is in violation of the hereinbefore cited Act of the Philippine Legislature and the Acts of Congress of the United States and is a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general [fol. 9] laws;" and the 14th Amendment to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it the equal protection of the laws.

3. That in the determination of the said taxable value of the shares in the amount of $458,028 the fiscal officers of the Commonwealth considered and included the following bonds of the market value of $5,400, 1st Carolina Jt.

St. Land Bank 5s 5/1/52 of the market value of $1,650 and Dallas Joint Stock Land Bank 5s of 1952 of the market value of $3,750. Such consideration and inclusion were erroneous, illegal and void for the reason that these bonds were issued under the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916 (Chap. 245, 39 U. S. Statutes at Large, p. 360 et seq., Sec. 16) and are not taxable by the Commonwealth of Pennsylvania (Section 26, "The Federal Farm Loan Act" supra). The consideration and inclusion of the said bonds in the determination of the taxable value of the shares of stock of the appellant constitute a taxation of the said bonds which are deemed and held to be instrumentalities of the United States Government and therefore the settlement made is in violation of "The Federal Farm Loan Act" supra, and is a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" [fol. 10] and the 14th Amendment to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it equal protection of the laws.

4. That the said resettlement of tax in the amount of $2,290.14 constitutes a taxation of the United States securities of the market value of $134,907. (See specification of objection 1, supra), and therefore constitutes the taxation of instrumentalities of the United States Government, violates Section 3701 Revised Statutes, 31 U. S. C., Section 742 and is a violation of Clause 2 of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it the equal protection of the laws.

5. That the said resettlement of tax in the amount of $2,290.14 constitutes a taxation of Philippine Islands 5½%

Public Improvement Loan due Aug. 1, 1941, Act of Philippine Legislature Number 2940, bonds, of the market value of $10,900. (See specification of objection 2, supra), and therefore violates the provisions of the Act of Congress of August 29, 1916, Act of Congress of July 21, 1921 and Act of the Philippine Legislature Number 2940 approved Feb-
[fol. 11] ruary 5, 1921, the Act of Congress of February 6, 1905, chap. 453, Vol. 33, U. S. Statutes at Large, part 1, page 689, and is a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it the equal protection of the laws.

6. That the said resettlement of tax in the amount of $2,290.14 constitutes a taxation of Joint Stock Land Bank bonds of the market value of $5,400. (See specification of objection 3, supra), and therefore constitutes the taxation of instrumentalities of the United States Government, violates the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916 (Chap. 245, 39 U. S. Statutes at Large, p. 360 et seq. Sec. 16) and is a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the appellant of its property without due process of law and denying to it the equal protection of the laws.

[fol. 12] 7. That in the determination of the said taxable value of the shares in the amount of $458,028 the fiscal officers of the Commonwealth deducted from the total value of the said shares of stock as determined by them in the amount of $466,914 the sum of $8886 as "deductions for shares of other corporations owned." The said sum of $458,028, the said sum of $466,914, and the said sum of $8886 were determined by the fiscal officers of the Com-

monwealth in the manner set forth in Exhibit "1" hereto attached. The said deduction of $8886 is erroneous, illegal and void for the following reasons: (a) As appears by Exhibit "2" attached hereto there were omitted from the list of exempt shares of stock owned by the appellant 160 shares of American Tel. & Tel. of the market value of $30,020 and 200 shares of F. & W. Grand 6½s, pfd. of the market value of $17,625. (b) As appears by Exhibit "2" attached hereto the value of the exempt shares of stock owned by the appellant and set forth in Exhibit "1" should have been the values as set forth in Exhibit "2" hereto attached and by a comparison of said Exhibit "1" and Exhibit "2," the exempt value of the shares of stock owned by the appellant should have been the sum of $155,989 instead of $71,373 as fixed by the fiscal officers of the Commonwealth. (c) That the amount of the "deductions for shares of other corporations owned" should have been $155,989 which is the exempt value of said shares of stock as set forth in Exhibit "2" hereto attached. The said value of the exempt shares of stock in the amount of $155,989 should have been deducted from the value of the [fol. 13] total assets of the appellant in order to relieve them from taxation in accordance with the purpose and intent of the legislature as expressed in the Act of April 25, 1929, P. L. 673.

8. If the tax imposed under and by the provisions of the said Act of April 25, 1929, P. L. 673, and the resettlement of tax here made against the appellant under and by the provisions of the said Act of Assembly be held to be a tax upon the shares of capital stock subscribed for or issued by the appellant or upon the shares of capital stock subscribed, as of the date of the Report required to be made under and by the provisions of the said Act of Assembly, for or issued by the appellant then and in such case the shares of stock owned by non-residents of the Commonwealth of Pennsylvania in the aforesaid tax year are not subject to tax and their taxation is in violation of the 14th Amendment to the Constitution of the United States for the reason that thereby the owners of the said shares of stock and the "Trust" Company which shall exercise the option to pay the amount of the tax from its general fund are deprived of their property without due process of law and have had denied to them the equal pro-

tection of the laws. Hence, if the said tax so resettled as aforesaid be a tax upon the shares of stock as aforesaid, then and in such case the said resettlement was erroneous, illegal and void for the reason that thereby tax was imposed by the Commonwealth upon 166 shares of stock of the appellant which were owned during the said tax year by non-residents of the Commonwealth of Pennsylvania [fol. 14] without constitutional or statutory authority so to do.

II. That the Petition for Resettlement filed with the Department of Revenue and the Petition for Review filed with the Board of Finance and Revenue of the Commonwealth of Pennsylvania are hereby made part of this appeal.

Schuylkill Trust Company, by Norman S. Farquhar, President. (Seal.)

Attest: Ralph W. Deitrich, Secretary.

Duly sworn to by Norman S. Farquhar. Jurat omitted in printing.

[fol. 15] EXHIBIT "1".

The order of the fiscal officers of the Commonwealth, that is to say, the Board of Finance and Revenue, made January 26, 1933 resettled the tax as follows:

$$\text{"441,667 Plus 25,247 app.} \left(\frac{467,714}{3,755,882} \times 71,373\right)\text{"} = 458,038.$$

The said sum of $441,667, is the value of capital stock paid in, surplus and undivided profits. The said sum of $25,247 is the appreciation whereby the actual value of capital stock paid in, surplus and undivided profits became $466,914 and is the actual value of the shares as determined by the said fiscal officers. The numerator of the fraction, $467,714, is the actual value of the shares as the tax was originally settled against the appellant. The denominator of the fraction, $3,755,882, is the actual value of all the assets of the appellant as fixed in the original

settlement made by the Department of Revenue and the Department of the Auditor General less "Reserve for Depreciation" $46,432. The multiplicand, $71,373, is the value which the fiscal officers of the Commonwealth, that is to say, [fol. 16] the Board of Finance and Revenue, fixed as the deduction value of exempt and non-taxable shares of stock herein-below listed (*) and the result of such computation, $458,028, is the taxable value of the shares as determined by the said Board of Finance and Revenue to which the rate of tax was applied with a resultant tax in the amount of $2,290.14.

(*) Deduction value of exempt and non-taxable shares of stock allowed by the Board of Finance and Revenue in the amount of $71,373 hereinabove referred to.

Hercules (Pfd.)
Delaware & Hudson
N. Y. C. Railroad Company
Penna. Power & Light
Philadelphia National
Pomeroy's Incorporated
" " of 1932
Pennsylvania Railroad
Reading Company (2nd Pfd.)

The above recited fraction, $\frac{467,714}{3,755,882} \times 71,373,$

equals 8,886. This sum of $8,886 is the portion of the above stated deduction value (71,373) which the Board of Finance and Revenue in its resettlement deducted from the total value of the shares, $466,914, in order to determine the taxable value of the shares in the amount of $458,028 to [fol. 17] which it applied the rate of tax and thus resettled the tax against the appellant in the amount of $2,290.14.

EXHIBIT "2"

Exempt Shares of Stock

Shares	Corporation	Market Value
70	Delaware & Hudson	$9,520
200	F. & W. Grand 6½s, Pfd.	17,625
100	Hercules Pfd.	11,600
119	N. Y. C. R. R. Com	16,184
200	Penna. P. & L. Pfd, 5%	19,200
182	Phila. Ntl. Bank	20,202
100	Pomeroy's Inc. Pfd. 6% 1931	10,000
100	Pomeroy's Inc. Pfd. 6% 1932	9,975
100	Penna. R. R.	6,125
160	American Tel. & Tel	30,020
100	Reading Co. 2nd Pfd.	4,700
		$155,151
	Penna. P. & L., supra, (800) plus Reading Co., supra, (38)	.838
		$155,989

Docket No. R-931

In re SCHUYLKILL TRUST COMPANY

Petition for Review of action taken by the Department of Revenue and approved by the Department of Auditor [fol. 18] General on petition for resettlement of Tax on Shares for the year ending 12-31-30.

And Now to wit January 27th, A. D. 1933, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania in this matter:

"And now to wit January 26th, A. D. 1933, This account is resettled and tax on shares is hereby imposed as follows:

$$441{,}667 \text{ Plus } 25{,}247 \text{ app.} - \left(\frac{467{,}714}{3{,}755{,}882} \times 71{,}373\right)"$$

Certified copy of resettlement sheet, showing the amount due as a result of the Board's action, will be mailed by the Department of Revenue.

(See Board of Finance and Revenue Minute Book No. 5.)

By Order of the Board of Finance and Revenue:
Edward Martin, State Treasurer and Chairman. Leon D. Metzger, Secretary of Revenue. William A. Schnader, Attorney General. Charles A. Waters, Auditor General.

Attest: Walter J. Kress, Secretary Board of Finance & Revenue.

Copy mailed to John Robert Jones, Esq., 1202 Girard Trust Bldg. Philadelphia, Pa., on January 27th, 1933.

[fol. 19] Copy

Box 424-9253-129
Ledger
Page
Company

Schuylkill Trust Company, c/o John Robert Jones, Esq., 1202 Girard Trust Building, Philadelphia, Penna.

In Account With Commonwealth of Pennsylvania, Dr.

To settlement of Shares for the year 1930, Dated 1/26/32 superseded by order Board of Finance and Revenue. See Minutes Book, Docket No. R 931	$2,306.08
To settlement hereby made. Pursuant to said order	$2,290.14
Total	$4,596.22

Credit

By settlement date 1/26/32 superseded by order Board of Finance and Revenue as above	$2,306.08
Due Commonwealth by This Settlement	$2,290.14
By payment on superseded settlement 4/4/32	570.43 a/c

(Commonwealth

Balance Due {Corporation $1,719.71.

[fol. 20] Treasury Department,

Board of Finance and Revenue

Harrisburg, Pa., 1/26/33—193.

Settled:

By the Board of Finance and Revenue.

(Signed) Walter J. Kress, (Seal)

Department of Revenue

Harrisburg, Pa., Feb. 9, 1933.

I Hereby Certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office.

Leon D. Metzger, Secretary of Revenue. (Seal.)

IN COURT OF COMMON PLEAS

STIPULATION OF FACTS

It is stipulated and agreed by and between Philip S. Moyer, Deputy Attorney General, for the Commonwealth of Pennsylvania, plaintiff, and John Robert Jones, Esquire, attorney for Schuylkill Trust Company, defendant, as follows:

1. That the Schuylkill Trust Company filed its report for the twelve months ending December 31, 1930, in the Department of Revenue and that a tax designated by the Commonwealth as a "tax on shares" was settled against the said Schuylkill Trust Company by the Department of Revenue in the amount of $2,306.08 January 25, 1932, and approved [fol. 21] by the Department of the Auditor General January 26, 1932, under authority of the Act of June 13, 1907, P. L. 640, as last amended by the Act of April 25, 1929, P. L. 673; that subsequent thereto and in due course the Board of Finance and Revenue made a resettlement of the said tax January 26, 1933, by which a settlement was made against the Schuylkill Trust Company of tax in the amount of

$2,290.14 in accordance with the following formula and calculation:

$$441{,}667. + 25{,}247. - \left(\frac{467{,}714}{3{,}755{,}882.} \times 71{,}373.\right) = 458{,}028$$

with a resultant tax in the amount of $2,290.14. That in the said formula and calculation the sum of $441,667 was the amount of capital stock paid in plus the surplus and the undivided profits, as shown by the report of the appellant; that the sum of $25,247 was the amount of appreciation of the market value of total assets over the book value of total assets; that the numerator of the fraction, $467,714, was the aforesaid sum of $441,667, plus the said sum of $25,247; that the denominator of the fraction, $3,755,882, was the value of the total assets of the appellant; that the multiplicand $71,373, was arrived at by the taxing officers as follows: the capital stock report or tax on shares report of each of the corporations whose shares of stock are owned by the appellant was examined and the taxable value of the capital stock, and the value of the capital stock relieved from capital stock tax was ascertained from the settlement made against each of the corporations whose shares of stock are [fol. 22] owned by the appellant; the total number of issued and outstanding shares of stock of each of the said corporations was divided into the aforementioned taxable value of the capital stock and the value of the capital stock relieved from capital stock tax, and the figure thus obtained in each case was multiplied by the number of shares of stock of each of said corporations owned by the appellant which sums thus obtained, together with the market value of the shares of stock of the Pennsylvania Power and Light Company and Philadelphia National Bank (market value of these two being taken because settlement against these corporations for 1930 had not been made at the time of the settlement of the appellant's report for tax on shares) are set forth in a column in paragraph four, totalling $71,372.91, which total does not include any sum for ownership of 160 shares of stock of the American Telephone and Telegraph Company by the appellant because in examining the capital stock tax settlement made against this company for 1930, the taxing officers found that the taxable value of the capital stock was $75,233.00, and dividing this sum by the total number of shares of stock of said company issued and out-

standing, to wit, 17,956, 512 obtained a quotient of four mills which multiplied by the number of shares owned by the appellant, to wit, 160, made the sum of .64 cents, and this sum being less than one dollar was not used in making up the totals composing said multiplicand, to wit, $71,373; the total market value of all of these shares of stock including the shares of stock of the American Telephone and Telegraph Company, owned by the appellant, was $155,989; that the result of the formula and calculation, $458,028 was the actual value of the shares of stock of the appellant subject [fol. 23] to tax as determined by the Commonwealth to which the rate of tax of five mills was applied with a resultant tax in the amount of $2,290.14; that the taxing officials by their addition of $441,667 and $25,247 thus determined the amount of capital stock paid in, the surplus and undivided profits, to have an actual value of $467,714. (The error in addition is of no consequence); that the minor fraction of the formula and calculation, to wit, $\frac{467,714.}{3,755,882.} \times 71,373.$ = 8,886., was used by the taxing officers of the Commonwealth to ascertain the amount of deduction from the amount of capital stock paid in, surplus and undivided profits to which the taxing officers of the Commonwealth held the appellant was entitled by reason of its investment in the shares of stock of corporations (which shares of stock had a market value of $155,989 as set forth in paragraph 2 of this Stipulation) as such taxing officers of the Commonwealth construed and applied the said Act of June 13, 1907, P. L. 640, as last amended by the Act of April 25, 1929, P. L. 673, under the authority of which act the settlement of tax here in question was made against the appellant. This sum of $8,886 the taxing officers of the Commonwealth accordingly deducted from the $467,714 in order to determine the actual value of the shares of the appellant which the taxing officers of the Commonwealth held to be subject to the tax, to wit, $458,028.

2. That the market value of shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares was $155,989 and that such shares of stock were [fol. 24] included at such value in the value of the total assets hereinbefore set forth, to wit, $3,755,882. These

shares of stock and the respective market value of each are as follows:

70	shs.	Delaware & Hudson	$9,520
200	"	F. & W. Grand 6½s pfd.	17,625
100	"	Hercules pfd.	11,600
119	"	N. Y. C. R. R. Com.	16,184
200	"	Penna. P. & L. pfd. 5%	20,000
182	"	Phila. Nt. Bank	20,202
100	"	Pomeroy's Inc. pfd. 6% 1931	10,000
100	"	" " " " 1932	9,975
100	"	Penna. R. R.	6,125
100	"	Reading Co. 2nd pfd.	4,738
160	"	Amer. Tel. & Tel.	30,020
			$155,989

3. That there was included within the total value of assets hereinbefore set forth, to wit, $3,755,882, the following assets (described in the appeal and specification of objections 1, 2 and 3 as follows: first 9 lines of Number 1; first 6 lines of Numbers 2 and 3 respectively), at the values hereinafter stated, to wit:

United States Securities	$134,907
Philippine Islands 5½% Public Improvement Loan due Aug. 1, 1941, Act of Philippine Legislature Number 2940, bonds	10,900
Carolina Jt. St. Land Bank 5s 5/1/52	1,650
Dallas Joint Stock Land Bank 5s of 1952	3,750
	$151,207

[fol. 25] 4. That the multiplicand, to wit $71,373 of the taxing formula was arrived at as explained in paragraph one hereof, and was composed of the following:

70	shs.	Delaware & Hudson	$290.50
200	"	F. & W. Grand 6½s pfd.	1,258.00
100	"	Hercules pfd.	327.00
119	"	N. Y. C. R. R. Com.	1,611.41
200	"	Penna. P. & L. pfd. 5%	19,200.00
182	"	Phila Ntl. Bank	20,202.00
100	"	Pomeroy's Inc. pfd. 6% 1931	9,750.00
100	"	" " " " 1932	9,587.00
100	"	Penna. R. R.	4,393.00
100	"	Reading Co. 2nd pfd.	4,754.00
160	"	Amer. Tel. & Tel.	None
			$71,372.91

5. That the total number of shares set forth in the statement of the settlement of the tax made by the Commonwealth was 2,652½ shares and that 166 shares thereof were owned by nonresidents of the Commonwealth of Pennsylvania.

6. The parties hereto reserve the right to introduce additional evidence.

Philip S. Moyer, Deputy Attorney General for the Commonwealth of Pennsylvania. John Robert Jones, Attorney for the Schuylkill Trust Company.

July 18, 1933.

[fol. 26] IN COURT OF COMMON PLEAS

SUPPLEMENTAL STIPULATION OF FACTS

It is stipulated and agreed by and between Philip S. Moyer, Deputy Attorney General, for the Commonwealth of Pennsylvania, plaintiff, and John Robert Jones, Esquire, Attorney for Schuylkill Trust Company, defendant, as supplemental to the Stipulation of Facts filed with the Court July 18, 1933, as follows:

1. That the non-residents of the Commonwealth of Pennsylvania who were the owners of 166 shares of stock of the

defendant, as set forth in Paragraph Five of the Stipulation of Facts filed with the Court July 18, 1933, were natural persons.

2. That the charter of the defendant, the Schuylkill Trust Company, was granted and letters patent were issued October 17, 1887.

3. That the defendant, the Schuylkill Trust Company, paid to the Commonwealth of Pennsylvania the sum of $570.43 on Apr. 4, 1932, as tax owing for the twelve months ending December 31, 1930. The defendant denies the validity of the tax settlement and the tax resettlement made against it for the year in question and claims that no further tax is owing for said year.

Philip S. Moyer, Deputy Attorney General, for the Commonwealth of Pennsylvania. John Robert Jones, Attorney for Defendant.

[fol. 27] IN COURT OF COMMON PLEAS

STATEMENT OF COUNSEL

Harrisburg, Pa., July 18, 1933, 10 A. M.

Before Honorable William M. Hargest, President Judge, Honorable Frank B. Wickersham, Additional Law Judge, and Honorable John E. Fox, Additional Law Judge.

Appearances:

For Plaintiff: Honorable Philip S. Moyer, Deputy Attorney General.

For Defendant: John Robert Jones, Esq.

Mr. Moyer: If Your Honors please, the case set for hearing this morning is the case of Commonwealth of Pennsylvania v. Schuylkill Trust Company, entered to No. 61 Commonwealth Docket 1933. This is an appeal by the Schuylkill Trust Company from a tax settled against it for the tax on shares, it is called, under the provisions of the Act of June 13, 1907, P. L. 640, and last amended by the Act of April 25, 1929, P. L. 673, for a twelve month period ending December 31, 1930.

The particular questions involved in the case, as we take them, in a brief way, from the appeal, are: must United States securities in this case be excluded in arriving at the actual value of the shares of the trust company subject to tax. Then there is a second question must Philippine Island bonds, referred to in particular language in the specification in objection No. 2, be excluded in arriving at the actual [fol. 28] value of the shares of the trust company subject to tax. Then No. 3 must the joint stock land bank bonds be excluded in arriving at the actual value of the shares subject to tax.

Now the fourth specification of objection is to the effect that in arriving at the actual value of shares subject to tax, no deduction is made for 160 shares of the American Telephone & Telegraph Company owned by the defendant and 200 shares of the F. & W. Grand 6½ Preferred owned by the defendant.

The Court (Judge Hargest): A Pennsylvania corporation?

Mr. Moyer: A Pennsylvania corporation, yes, while A. T. & T. is not a Pennsylvania, it is a foreign one registered to do business here.

The Court (Judge Fox): It pays tax?

Mr. Moyer: Yes, as a foreign corporation. Then the fifth specification of objection is, in substance, to the market value of the shares of stock owned by the defendant in other corporations which paid a capital stock tax in Pennsylvania, to wit, $155,989, having been used as a deduction in arriving at the actual value of the shares subject to tax in a proportionate way.

The Court: Read that again.

Mr. Moyer: The fifth objection as I was stating, was to the effect that in arriving at the actual value of these shares subject to tax the Commonwealth used a proportionate method for arriving at the tax and exempt value of [fol. 29] these shares of stock, or rather as the Act of Assembly says, the value at which the stock of these corporations was made liable for tax, or was relieved from the capital stock tax.

The Court (Judge Hargest): Instead of a flat deduction.

Mr. Moyer: Instead of a flat deduction, a proportionate method, as will be explained fully later and as set forth in the Statement of Facts.

The Court (Judge Wickersham): The Bell Telephone Company case ten years ago was decided and they used the proportionate method in arriving at the amount of tax.

Mr. Moyer: I don't recall the point in that case.

The Court (Judge Wickersham): There were about twenty pages of conclusions.

Mr. Moyer: The proportionate method in this case, as will be explained later, was used because of the decision in the Hazelwood Savings and Trust case, which will be explained very fully and entirely because of the decision in that case. In other words, it wasn't proven in this case that the shares were purchased out of original capital and the Commonwealth might not have allowed any deduction at all because of that, but they did allow a proportionate deduction, as will be explained, and as I said, was entirely proper in the Hazelwood case. Of course that is one of the contentions and matters of dispute in this case.

[fol. 30] Now the sixth objection was, in substance, were the taxing officers of the Commonwealth, in arriving at the actual value of the shares of stock subject to tax, required to deduct the market value of these shares of stock $155,989, from the value of the total assets of the defendant, in order to relieve them from tax and to arrive at the tax on shares as provided by this particular Act of 1907, as amended last by the Act of 1929.

And the last objection in the appeal is to the effect that if this is a tax on shares under the Act in question are the 166 shares of stock owned by non-residents of the Commonwealth subject to tax, it being agreed in the stipulation as to facts that there are 166 shares of the stock of the trust company owned by non-residents of Pennsylvania.

The Court (Judge Fox): Do you mean the stock of the trust company itself?

Mr. Moyer: Yes. The contention, as it appears to me in the various objections that I have just detailed briefly, is that it is a tax on the assets of the corporation. Now I don't want to tread on Mr. Jones' shoes here, he will explain his position, but as I am taking the time here now to explain it——

The Court (Judge Hargest): You applied the loan tax instead of the capital stock tax, in effect?

Mr. Moyer: Yes, it is something of that nature. Therefore, if it is not a tax on property against the assets of the

corporation, as Mr. Jones would appear to contend in the objections just previously detailed he says in No. 7 objection that if it is then a tax on shares we are entitled to be [fol. 31] relieved from the tax on one hundred and sixty-six of these shares because they are owned by non-residents of Pennsylvania and there is no jurisdiction in this State to tax them because of the fact that the owners are outside of the State.

Now so much for the questions involved. We have a stipulation to try without a jury in this case, which we desire to file, or have introduced in evidence first and filed and with it we have the appeal and specification of objections, which we desire to introduce in evidence, and the report of shares of this company, Schuylkill Trust Company, for the twelve month period ending December 31, 1930, with the settlement thereon of the taxing officers of the Commonwealth, the settlement in this case having been made on January 25, 1932, by the Department of Revenue and approved on January 26, 1932, by the Department of the Auditor General. A petition for resettlement was duly filed with the Department of Revenue and was refused by that Department, with the approval of the Department of the Auditor General and in due course a petition for a review was filed with the Board of Finance and Revenue. Upon the hearing of the matter before the Board, the Board resettled the original settlement made in this case and it is from this settlement of the Board of Finance and Revenue that the appeal is now taken. In brief this resettlement now before the Court is on a certain taxing formula, which I will briefly explain.

Now the first figure $441,667 is the capital paid in, surplus and undivided profits of this company, as reported in its report on shares. You will notice to that is added $25,247 that is determined by the Board as appreciation on [fol. 32] these stocks and assets of the corporation, to be added to the capital paid in, surplus and undivided profits. Then there is a minus sign, which indicates that from this total is to be subtracted the result of this so-called minor fraction, the numerator of which is composed of the first figure, $441,667, which I have stated was capital paid in, surplus and undivided profits, plus the appreciation of $25,247.

Now there is a slight error that was made in the addition, which we have noted in the stipulation here is of no conse-

quence, that is what was meant was to be the total of these two. The denominator of this minor fraction was the total assets of this trust company for that period. The multiplicand, $71,373, is detailed in the stipulation of facts to be made up of the items resulting from this determination by the Department. They took the capital stock tax reports of each of the companies whose stock was owned by this appellant. They examined the settlements made in each of those cases to find the taxable value of that particular stock and the value relieved from capital stock, I should add that is the taxable value for capital stock tax purposes and in each case the amount relieved from capital stock tax. For instance, if it was a manufacturing corporation or otherwise exempt, that determined that situation. Or, if there was tax on shares it was the value thereof, the taxable value thereof or relieved from tax under those circumstances. This amount that was then gotten by those taxing officers was divided by the total number of issued and outstanding shares of stock of the particular corporation they were dealing with. That quotient, which we might call the taxable value allocated to each share, or the amount relieved [fol. 33] from tax and allocated to each share, was then multiplied by the number of shares of that particular company owned by this defendant. And so they went down the list, taking each corporation——

The Court (Judge Hargest): That is the sum total of the untaxed proportion of those companies?

Mr. Moyer: That is the sum total of $71,000, we might say roughly, is the sum total of the tax and exempt value of the shares of stock which this company owned, the tax and exempt value.

The Court (Judge Fox): It is not the number of shares?

The Court (Judge Hargest): It is the untaxed part that you are claiming?

Mr. Moyer: We are saying that the seventy-one thousand represents the tax and exempt value of the particular shares of stock owned by this defendant. I can explain it a little better in a moment when I get to something else.

The Court (Judge Wickersham): That is, the value of the shares would be $458,028?

Mr. Moyer: That is the final actual value subject to tax. And I want to explain something further: In considering these shares as stock owned by this defendant to get the

tax and exempt value as we may call it now roughly, there were two corporations that the taxing officer when he came to settle this case, found had not been settled by the [fol. 34] taxing officers, the Pennsylvania Power & Light and the Philadelphia National Bank, and when the taxing officers dealt with those they put in the market value for that particular period for those shares, because they did not know, not only didn't know, but they had no way of getting at the tax and exempt value because the report for capital stock had not been settled yet in those cases, and in the case of the National Bank report the tax on shares had not been settled. So the officers took the market value. Now when it came to the last one on the list, which is the last on the list as we have it here as a stipulation, 160 shares of American Telephone & Telegraph Company, when the officers settled this, or resettled it, the officers on the Board examined the report of the American Telephone & Telegraph Company and they found that the taxable value in that case, as settled for capital stock tax of this corporation, was $75,233, and they also found that the issued and outstanding shares of stock of this company was 17,956,512 shares. Following the method that they had pursued now with the others, they divided the shares outstanding and issued into the taxable value and they got 4 mills, which when multiplied by the 160 shares, gave 64 cents. This amount being less than a dollar the taxing officers did not put it in the compilation at all because they were dealing with round numbers, they didn't put it in the compilation. That is the reason that after the word, when you see the stipulation, when you come to American Telephone & Telegraph, so far as any tax and exempt allowance for those shares, is marked none, and that is the explanation as made in the stipulation.

[fol. 35] The Court (Judge Hargest). Mr. Jones, I do not find in your brief a formula and a calculation as you apply it.

Mr. Jones: Yes, at the end. I will explain it as I go along. I prefer to take each point separately than to confuse the Court. It is at the end of my brief. I am quite sure.

Mr. Moyer: Now then, with this explanation of how the multiplicand of this minor fraction was arrived at, we get the quotient of 8886, which quotient is deducted from the

total of capital paid in, surplus and undivided profits to wit, the $441,667, plus the appreciation of $25,247, and the taxing officers get $458,028 as their determination under this Act of Assembly as the actual value of the shares of stock subject to this tax on shares, which gave a tax on shares in the amount of $2,290.14.

Now I understand that there is a small amount which was paid in April of last year and we will have an additional stipulation filed at the Court—I didn't know that until this morning about this payment, we will file an additional stipulation showing the actual balance due on the settlement.

Now it is further agreed between counsel that if in any way during the argument of this matter, during the time the Court considers the briefs, there are any facts in this case that are not sufficiently set forth in this stipulation, or otherwise the Court considers any explanation, or either counsel believes it needs explanation or detail, counsel have agreed to file an additional stipulation, because here it is not a case of trying to hold to a settlement just as it stands [fol. 36] for the mere purpose of getting this tax, it is to settle these questions that are raised and to have them definitely disposed of.

Mr. Jones just called my attention to the fact that the petition for resettlement and the petition for review was not referred to as being offered in evidence. I desire that those papers at present be offered in evidence and in addition also the settlement as made by the Board of Finance and Revenue, from which this appeal is taken, together with all other relevant papers that have to do with this particular settlement and appeal.

(Argument.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the above notes taken by me on the hearing of the above cause and that this copy is a correct transcript of the same.

John Ruth, Official Stenographer.

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved and directed to be filed.

Frank B. Wickersham, A. L. Judge.

[fol. 37] IN COURT OF COMMON PLEAS

DEFENDANT'S REQUESTS FOR CONCLUSIONS OF LAW AND ANSWERS OF THE COURT

The Schuylkill Trust Company, Defendant in the above entitled case, requests your Honorable Court to find the following Conclusions of Law:

1. A tax imposed upon shares of stock as shares is a personal levy against the holder of the shares without any intent to reach the assets of the corporation which issued the shares.

Affirmed.

2. A tax imposed upon shares of stock as shares is a tax upon the stockholders' interest without diminution on account of the kind of assets which constitute the property and capital stock of the corporation which issued the shares.

Affirmed.

3. Shares of stock are intangible personal property, a tax imposed upon them is a personal property tax and their situs for taxation is the domicile of their owner, hence shares of stock owned by non-residents of Pennsylvania are not subject to tax except in the case of shares of stock issued by national banks located in the State, the authority to tax which national bank shares owned by non-residents and residents of the State being given by United States Revised Statutes, Section 5219.

Refused.

[fol. 38] 4. The tax imposed by the Act of April 25, 1929, P. L. 673, is not a tax upon the stockholders' interest in the shares. Under the method provided in the said act to determine the value to which the rate of tax is directed to be applied there is a diminution from the amount of capital stock paid in, surplus and undivided profits of the trust company by reason and on account of the kind of assets which constitute the property and capital stock of the trust company.

Refused.

5. The tax imposed by the Act of April 25, 1929, P. L. 673, is not a tax upon the stockholders' interest in the shares, for the reason that though the interest of the stock-

holder be the same in the case of two or more trust companies, the tax is not the same in each such case, the difference in taxable value and consequent difference in tax being caused by the amount and value of the assets owned by each trust company which are exempted under the provisions of the act.

Refused.

6. The tax imposed by the Act of April 25, 1929, P. L. 673, is not imposed upon the shareholders' interest but upon assets owned by the trust company, the taxable value of which is determined by deducting and eliminating from consideration the full value of the assets which are exempted by the said act and assets which the state has no jurisdiction to tax.

Refused as stated.

[fol. 39] 7. The amount of capital stock paid in, the surplus and undivided profits of the trust company being the difference between the value of the total assets and the amount of assets sufficient to cover liabilities to others than stockholders, it is required by the Act of April 25, 1929, P. L. 673, that in determining the taxable value to which the rate of tax is directed to be applied, assets in an amount sufficient to cover liabilities to others than stockholders be deducted from the value of the total assets of the defendant trust company.

Refused as stated.

8. In determining the taxable value to which the rate of tax is to be applied under the Act of April 25, 1929, P. L. 673, the trust company must be regarded as though it did not own the assets which are declared by the act to be exempt and therefore shares of stock issued by corporations "liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares" must be deducted at their full value from the value of the total assets of the defendant trust company.

Refused.

9. In determining the taxable value to which the rate of tax is to be applied under the Act of April 25, 1929, P. L. 673, the trust company must be regarded as though it did not own the assets which are non-taxable such as United States securities, Philippine Islands bonds and Joint Stock

Land Bank bonds, therefore such securities and bonds must [fol. 40] be deducted at their full value from the value of the total assets of the defendant trust company.

Refused.

10. Assets owned by the defendant trust company consisting of shares of stock issued by national banks being subject to tax at their actual net asset value under the Act of July 15, 1897, P. L. 292, as amended, against their owner, the defendant, such national bank shares cannot be made the basis, directly or indirectly, of other or further taxation and therefore in determining the taxable value to which the rate of tax is directed to be applied under the Act of April 25, 1929, P. L. 673, such shares must be deducted at their full value from the value of the net assets, that is, from the sum of the amount of capital stock paid in, surplus and undivided profits of their owner, the defendant.

Refused.

11. Since under and by the provisions of the Act of April 25, 1929, P. L. 673, the value of the assets to which the rate of tax is directed to be applied is determined by an express deduction, elimination and exemption of shares of stock issued by corporations "liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares" and since under the said act as construed and applied by the Commonwealth and the resettlement of tax made against this defendant under the alleged authority of the said act there is no deduction, elimination or exemption of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned [fol. 41] by this defendant of the value of $151,207, the said Act of April 25, 1929, P. L. 673, as construed by the taxing officials of the Commonwealth and the resettlement of tax made against this defendant under the alleged authority of the said Act of Assembly discriminate in favor of the said described shares of stock exempted under the provisions of the said act and against the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds.

Refused.

12. Under the provisions of the Act of April 25, 1929, P. L. 673, as construed by the taxing officials of the Commonwealth in the said resettlement of tax made against this defendant, tax is imposed upon the United States se-

curities, Philippine Islands bonds and Joint Stock Land Bank bonds of the total value of $151,207.

Refused.

13. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant impose a tax upon United States bonds and securities of the market value of $134,907, impose a tax upon instrumentalities of the United States Government, violate Section 3701 Revised Statutes, 31 U. S. C., Section 742, and are a violation of Clause 2 of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall [fol. 42] be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws.

Refused.

14. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant impose a tax upon Philippine Islands 5½% Public Improvement Loan due Aug. 1, 1941, Act of Philippine Legislature Number 2940, bonds, of the market value of $10,900, violate the provisions of the Act of Congress of August 26, 1916, Act of Congress of July 21, 1921 and Act of the Philippine Legislature Number 2940 approved February 5, 1921, the Act of Congress of February 6, 1905, chap. 453, Vol. 33, U. S. Statutes at Large, part 1, page 689, and are a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws.

Refused.

[fol. 43] 15. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to the defendant and the resettlement of tax made against the defendant impose a tax upon Joint Stock Land Bank bonds of the market value of $5,400, impose a tax upon instrumentalities of the United States Government, violate the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916 (Chap. 245, 39 U. S. Statutes at Large, p. 360 et seq. Sec. 16) and are a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws.

Refused.

16. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant wherein Philadelphia National Bank shares of the value of $20,202 were not deducted from the value of the net assets of the defendant and not eliminated entirely from consideration in determining the taxable value to which the rate of tax was applied discriminate against and impose a tax upon the said shares of stock and violate the provisions of Section 5219 of the Revised Statutes of the United States. Such [fol. 44] shares of stock being subject to tax under the Act of July 15, 1897, P. L. 292, as amended, against their owner, they cannot be made the basis, directly or indirectly, of any other or further taxation.

Refused.

17. The Commonwealth being required by the provisions of Section 5219 of the Revised Statutes of the United States to deduct the value of the Philadelphia National Bank shares owned by the defendant from the value of the net assets, that is, from the amount of capital stock paid in, surplus and undivided profits, is required in order to preserve uniformity of taxation to make a similar deduction of all of the exempt assets of the defendant of the total

value of $155,989 consisting of "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares," and by its failure to make such deduction the Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant violate Section 1, Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws.

Refused.

[fol. 45] 18. The tax imposed by the Act of April 25, 1929, P. L. 673, should have been settled against this defendant trust company upon a taxable value determined by deducting from the value of the total assets in the amount of $3,755,882. (1) assets sufficient to cover liabilities to others than stockholders in the amount of $3,334,599.93 (2) the full value of the exempt shares of stock described in the act, including the value of the Philadelphia National Bank shares, in the amount of $155,989 and (3) the value of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds in the amount of $151,207, thereby leaving a taxable value in the amount of $114,086.07, tax upon which at the rate of five mills is $570.43.

Refused.

19. The defendant having paid tax to the Commonwealth in the amount of $570.43, no tax is owing to the Commonwealth and judgment should be entered in favor of the defendant with costs.

Refused.

John Robert Jones, Attorney for Defendant.

[fol. 46] IN COURT OF COMMON PLEAS

OPINION—October 19, 1933

By the COURT:

This is an appeal from the order of the Board of Finance and Revenue upon a tax settlement of said board against the defendant, being the resettlement approved January 26, 1933.

It was agreed by the attorney general and counsel for the defendant that a trial by jury be dispensed with in the above stated case, and the same be submitted to the decision of the court, to be heard and determined upon the provisions of an act of assembly approved April 22, 1874, P. L. 109.

The facts have been agreed upon; the method used in arriving at the tax is not objected to; and the only question is whether or not the accounting officers have included as taxable certain shares and securities which the defendant claims are exempt, and whether the tax involved is a tax on shares or a tax on personal property. These questions are more specifically stated as follows:

Questions Involved

1. Must United States securities be excluded in arriving at the actual value of the shares of the trust company subject to tax?

2. Must Philippine Island bonds be excluded in arriving at the actual value of the shares of the trust company subject to tax?

[fol. 47] 3. Must Joint Stock Land Bank bonds be excluded in arriving at the actual value of the shares of the trust company subject to tax?

4. It is claimed that in arriving at the actual value of the shares of stock of the defendant subject to taxation a flat deduction should be allowed for 160 shares of American Telephone & Telegraph Company owned by the defendant, and 200 shares of F. & W. Grand 6½s preferred, owned by the defendant, which companies are Pennsylvania corporations paying a capital stock tax.

5. Should the market value of the shares of stock owned by the defendant in other corporations, which paid a capital

stock tax in Pennsylvania, to wit, $155,989, have been used as a deduction in arriving at the actual value of the shares subject to tax instead of the tax and exempt value of said stock, to wit, $71,373?

6. Were the taxing officers, in arriving at the actual value of the shares of defendant subject to tax, under the provisions of the Act of April 25, 1929, P. L. 673, required to deduct the sum of $155,989, the market value of the shares of stock of the defendant in other Pennsylvania corporations, from the value of the total assets of the defendant in order to relieve them from taxation?

7. Is the tax imposed by the said Act of 1929 a tax upon shares of the defendant? and if so are the 166 shares of stock owned by non-residents of the commonwealth subject to the tax on shares?

[fol. 48] Discussion

We will consider the seventh question first as much of the briefs of the attorney general and counsel for the defendant is devoted to that proposition, it being contended by the commonwealth that the Act of 1907, as amended, imposes a tax upon shares qua share; whereas counsel for the defendant corporation insists that the tax imposed by the said act, as amended, is a tax on personal property and that the decisions of the Supreme Court construing the personal property tax Act of June 17, 1913, P. L. 505, should apply and control the instant case.

An exhaustive history of the Acts of Assembly imposing tax upon corporations in Pennsylvania is submitted by the attorney general. We think however, that in discussing this question we need only refer to the Act of June 13, 1907 P. L. 640, and its amendments.

Section 1 of the act provides, inter alia:

"* * * and every company * * * shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing * * * setting forth the full *number of shares* of the capital stock subscribed for or issued by such company, and the actual value thereof, * * *; and thereupon it shall be the duty of the Auditor General to assess such *shares* for taxation at the

rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by *adding together the amount of capital* [fol. 49] *stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares.* * * * After the Auditor General shall have fixed the value of the *shares of stock* in any such company by the method hereinbefore provided, and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on *all such shares.* And it shall be the duty of the president, secretary, or treasurer of any such company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such company's place of business so as to give notice to the *shareholders* of such valuation; and it shall be the duty of the Auditor General to hear any *shareholder* upon the subject of the valuation of such *shares of stock,* at the Auditor General's office, within a period of thirty days from the date of said settlement. It shall be the duty of every such company, within a period of forty days after the date of such settlement by the Auditor General, at its option to pay the amount of said tax to the State Treasurer from its general fund, *or collect the same from its shareholders* and pay over to the State Treasurer * * * *.*" (Italics are ours.)

This section further provides that if the officers refuse to make such report or make a false report, the auditor general, after having "ascertained the actual value of *each share* (Italics are ours) of the capital stock of such company from the best information he can obtain, add thereto [fol. 50] fifty per centum as a penalty * * *." This section also provides:

"* * * That in case any such company shall collect annually from the *shareholders* thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of *each share* of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus and undivided profits as is not invested in shares of stock of corporations liable to pay to the Common-

wealth a capital stock tax or tax on *shares,* and dividing this amount by the number of *shares* of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the *shares,* and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth." (Italics are ours.)

It will be observed from the above quotations that the Act of 1907 provides a complete system for assessing and collecting tax on shares of stock of a trust company.

The Act of 1907 was amended by the Act of July 11, 1923, P. L. 1071, providing a different date for making and filing with the auditor general a report of said trust companies, and slightly changing the language of the Act of 1907 so as to read:

"* * * the actual value of *each share* of stock to be ascertained and fixed by adding together *so much of* the amount [fol. 51] of capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. * * *" (Italics are ours.)

Said Act of 1907 was again amended by the Act of May 7, 1927, P. L. 853, as follows:

"* * * the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, *or relieved from the payment of capital stock tax* or tax on shares, and dividing this amount by the number of shares. * * *" (Italics are ours.)

The following words in the Act of 1907 are omitted in the Act of 1927:

"in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company,—the value of

each share of stock to be ascertained and fixed as hereinbefore provided, and pay said tax";

so that the sentence reads: "That *upon the payment of the tax fixed by this act* into the State Treasury the *shares*, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate [fol. 52] shall be exempt from all other taxation under the laws of this Commonwealth." (Italics are ours.)

This brings us to the amendment of the Act of 1907 by the Act of April 25, 1929, P. L. 673, which changes the date for making the report on the part of trust companies, requiring said report to be filed with the Department of Revenue, but makes no change in the method of assessing the value of "such shares for taxation." To clarify this amendment we quote from the amended section (see page 675), which, after referring to the report to be made by the trust company, setting forth the full number of shares and capital stock provides:

"* * * and thereupon it shall be the duty of the Department of Revenue to assess *such shares* for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, * * *."

Otherwise the act does not depart materially from the Act of 1907 as theretofore amended, except that from the Act of 1929 is omitted certain provisions in the Act of 1907 for the reason that said omissions are now incorporated in section 807 of the Fiscal Code, Act of April 29, 1929, [fol. 53] P. L. 343, which was passed at the same session.

Said Act of 1929 amends the Act of 1907 by striking therefrom the proviso which had to do with the failure or refusal of trust companies to make the report required; and also the proviso which had to do with the requirement placed upon the president, secretary or treasurer of the company to post the notice of the settlement as aforementioned, for the reason that these latter provisos were also incorporated in section 1705 of said Fiscal Code of 1929.

In quoting from the Act of 1907 and its amendments it clearly appears that the intention of the Legislature was to tax shares of stock. The term "shares of stock" appears many times in the Act of 1907 and is not omitted in the amendatory acts, including the Act of 1929 upon which act the present settlement was made.

In Commonwealth v. Mortgage Trust Co. of Penna., 227 Pa. 163, it was held:

"The Act of March 30, 1811, 5 Sm. L. 228, was in no way affected by the Acts of June 8, 1891, P. L. 229, and June 13, 1907, P. L. 640, and therefore the remedy provided by that act for the settlement and collection of taxes on the *stock* of trust companies was operative as to all such taxes as had accrued before the Act of June 13, 1907, P. L. 640 became operative."

[fol. 54] Commenting upon the policy of the commonwealth it was said by Mr. Justice Elkin, writing the opinion of the Supreme Court (page 175) as follows:

"* * * The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed. They made their reports to the auditor general under the general revenue acts of 1879, 1889 and 1891, and other statutes, just as other private corporations did, and the valuation of their capital stock was ascertained and the tax settlement made upon the same basis. This method of taxing the capital stock of these institutions (trust companies) continued in force until the act of 1907 was passed. As the trust company business grew in magnitude, as it did grow after the passage of the act of 1895 which conferred quasi banking privileges, the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks. In this connection it will be helpful to consider the policy of the commonwealth in taxing bank stocks. * * *"

The method of taxing the stock of banks was finally provided in the Act of 1891 which provided an alternative [fol. 55] method whereby any bank or savings institution incorporated by this state or the federal government may collect from the shareholders and pay the state treasury a tax of eight mills on the par value of its shares in lieu of all taxation except upon its real estate, and upon failure to so elect to pay a tax upon the par value of the shares, it shall be subject to a tax of four mills upon the actual value of its shares of capital stock, without any exemption. Many inequalities developed in the administration of this act; nevertheless it was sustained by this court, by the Supreme Court of Pennsylvania (see 168 Pa. 109), and by the Supreme Court of the United States (167 U. S. 461), in which latter case it was said (p. 465):

"It is further insisted that the act is really one taxing the bank and *not taxing the shares of stock* as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of section 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the eight mills shall make a report to the auditor general 'setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation', * * *." (Italics are ours.)

We find similar provisions in the Act of 1907, and therefore we think it perfectly clear that under the Acts of 1885, 1889 and 1907 to the present time, the tax has been pro- [fol. 56] vided as assessable on the share of stock in the hands of the stockholders. Not one of the acts, since the tax was assessed on the shares, contained any provisions for collection, upon the failure to pay, out of the general funds of the bank or trust company.

Discussing the nature of a tax such as is provided in the Act of 1907 as amended, it was said by Mr. Justice Moody, writing the opinion of the Supreme Court of the United States in Home Savings Bank v. Des Moines, 205 U. S. 503, 51 Law Ed. 910, as follows:

"• • • The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him" (citing cases). *"The theory sustaining these cases is that the tax was not upon the corporations' holding of bonds, but on the shareholders' holdings of stock,* and an examination of them shows that in every case the tax was assessed *upon the property of the shareholders* and not upon the property of the corporation. • • •" (Italics are ours.)

It clearly appears, therefore, that a tax on shares is not a tax upon the capital stock, property or franchises of a corporation. It is in no sense a tax upon the corporation; [fol. 57] it is a personal levy on the shareholders based on their stock, without any intent to reach the property which gives the latter its value: Des Moines National Bank v. Fairweather, et al., 263 U. S.—103—syl. 4 and 5.

The Act of 1907 is a revenue statute and in the interpretation of its provisions this thought should be kept in mind.

"• • • Technical, or etymological, definitions of words are of little if any help in determining what the legislative language means in a revenue statute • • •. Some one must ascertain and fix the value of capital paid in, surplus and undivided profits in order to determine the value of the shares, otherwise there would be no basis for taxation. The report required to be filed by a trust company under the Act of 1907 is the first step taken, but it is only a means to an end, the end being to ascertain *the actual value of the shares* by the Auditor General, whose duty as an accounting officer requires him to make the settlement and collect the tax.";

per Elkin, J., in Commonwealth v. Union Trust Co. of Pittsburgh, 237 Pa. 353, 358. And in Dupuy v. Johns, et al., 261 Pa. 40, it was held:

"A tax on stock of foreign corporations, eo nomine, in the hands of resident shareholders, is not a tax on the

property represented by the capital of the corporation, but is a personal levy against the shareholder in question, [fol. 58] based on the value of his stock, without any intent to reach the property that gives the latter its value."

See also Callery's Appeal, 272 Pa. 255.

If this were a tax on the property of the corporation then why should the act provide that notice to shareholders should be given by posting of the notice of assessment in the company's place of business? We think this is done to the end of due process of law. It is further provided that the secretary of revenue shall give a hearing to any stockholder who wishes to protest the assessment made —see section 807 of the Fiscal Code, Act of April 9, 1929, P. L. 343. See also Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375, and Commonwealth v. Provident Trust Co., 287 Pa. 251, in which case it was said by Mr. Justice Kephart, writing the opinion of the Supreme Court (page 256), comparing the Emergency Profits Tax Act of 1923 with the Act of 1907, as follows:

"* * * The Act of 1907 and the Act of July 11, 1923, regulated the *taxing* of *shares of stock*, while the Act of June 28, 1923, dealt with a tax on net income. Therefore, as to the class of taxes on which the Act of 1907 operated, this appellant continued to be relieved from its payment under the Act of June 28, 1923. The exemption is thus seen to be continuous. That a reenacting statute which makes no changes in its substantive law should be construed as continuing the law as it existed before its passage, unless the legislative intent is manifestly to the contrary through irreconcilable inconsistencies with, or a particular reference [fol. 59] there made to, an intermediate statute, seems to be the rule deduced from the cases."

It thus clearly appears that the Act of 1907 and its amending acts constitute one piece of legislation upon the subject contained in the first act—in this instance the Act of 1907, as we have pointed out in the immediately preceding paragraphs.

Counsel for the defendant contends that a careful study of the taxing acts involved shows that this tax is not a tax on shares as shares. We are not able to follow this conclusion for the reasons heretofore given: Commonwealth v.

Provident Trust Company, supra. We find nothing in the Acts of 1907, 1923, 1927 or 1929, to support this contention. We find little change to the Act of 1907 in the Act of July 11, 1923, Act of 1927, or Act of 1929. The same thought is carried through all of said acts and therefore the language used by Mr. Justice Kephart in Commonwealth v. Provident Trust Co., supra, also applies to the instant case.

We refer now to the first three questions involved in this case which are: Must the United States securities, the Philippine Island bonds, and the Joint Stock Land Bank bonds be excluded in arriving at the actual value of the shares of the trust company subject to the tax?

In order to arrive at a sound conclusion with respect to these three questions we must consider how the value of the shares was ascertained by the taxing authorities.—See Stipulation of Facts.—In this calculation no deduction was [fol. 60] made for the value of the three items of federal securities above mentioned. It must be observed that this procedure was not an effort on the part of the taxing authorities to levy a tax upon these federal securities; the only purpose was to arrive at the value of the shares for we have heretofore determined that the tax imposed upon trust companies by the Act of 1929 was not a tax on personal property, nor a tax on the assets of the corporation, but a tax upon the shares held by the shareholders of said trust company. We are of opinion, therefore, that when the taxing officers of the Commonwealth of Pennsylvania refused to deduct the value of these federal securities from the total assets of the trust company they were acting strictly in accordance with the law as defined by the Supreme Court of the United States.

The attorney general, in support of the conclusion reached by the taxing officers, relies upon Van Allen v. The Assessors, 70 U. S. 573, 583; National Bank v. Commonwealth, 76 U. S. 553; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 Law Ed. 456; People's National Bank of Kingfisher, Okla. v. Board of Equalization of Kingfisher County, Okla., 67 Law Ed. (U. S.) 471; Des Moines National Bank v. Fairweather, 263 U. S. 103, 68 Law Ed. 191; Educational Films Corporation of America v. Ward, 282 U. S. 379, 390, 75 Law Ed. 400, 407; Pacific Co., Ltd. v. Johnson, 285 U. S. 480, 76 Law Ed. 893, 896; and Home Savings Bank v. Des Moines, 205 U. S. 503, 51 Law Ed. 901.

The leading case appears to be Van Allen v. The Assessors, supra. This case involved the question of the right on the part of the State of New York to tax shares in a national banking association created under the Act [fol. 61] of Congress of June 1864. The facts are fully set forth in a statement at the beginning of the cited case. The opinion was written by Mr. Justice Nelson beginning on page 581, from which we quote (p. 583-4):

"But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. • • •

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it.

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"This is an answer to the argument that the *term,* as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must [fol. 62] institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

"Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that

the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization. * * *"

In National Bank v. Commonwealth, supra, the question arose whether under the law of Kentucky a tax was imposed upon the shares of the bank or upon the capital of the bank, which was all invested in government bonds. The Kentucky act imposed a tax on bank stock in the sum of fifty cents on each share thereof, equal to $100 of stock therein owned by individuals, corporations or societies, Held:

"The statute of Kentucky * * * taxing bank stock, levies a tax on the shares of the stockholders, as distinguished from the capital of the bank invested in Federal securities."

Mr. Justice Miller, writing the opinion of the court—see page 359—said:

"* * * it has been established as the law governing this court that the property or interest of a stockholder in an [fol. 63] incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the States, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in Federal securities, provided the taxation does not violate the rule prescribed by the act of 1864.

* * * * * * *

"But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers

of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a *tax on these shares.* (Italics are ours.) It has been the practice of many of the [fol. 64] States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

* * * * * * *

"* * * But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, [fol. 65] as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

In Cleveland Trust Co. v. Lander, supra, it was held (L. Ed. 456):

"A tax on the shares of stock in a trust company under the Ohio statutes is not equivalent to a tax on the property of the corporation, and therefore the shareholders are not entitled, under U. S. Rev. Stat. Section 3701, to have a deduction, from the value of the shares, of the amount of a capital stock of the company which is invested in United States bonds."

See opinion of Mr. Justice McKenna, p. 113, L. Ed. 458, citing with approval Van Allen v. The Assessors, supra. Referring to the constitution and laws of the State of Ohio it was said by Mr. Justice McKenna:

"* * * And the deduction is made 'that, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States government bonds then owned by it.' In other words, the contention is that the tax on the shares being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the capital of the company invested in the United States bonds.

[fol. 66] "The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States * * * between which there is no want of harmony. And what the constitution of the State of Ohio requires, or what the statutes of the State require as to taxation, must be left to be decided by the Supreme Court of the State, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfied the constitution of the State as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the Federal tribunals."

The case of Home Savings Bank v. Des Moines, supra, is so easily distinguishable as a tax upon the capital and not on the shares, that an extended reference to it is not necessary.

In Des Moines National Bank v. Fairweather, supra, it was held:

"The mere fact that the capital, surplus, and undivided earnings of a bank are made the measure of value of the shares for taxation, and that the bank is required primarily to pay the tax on the shares, does not show that the assessment is upon the property of the bank rather than upon the stockholders' shares.

[fol. 67] "The fact that, in fixing the value of shares of bank stock for purposes of taxation, the value of the capital, shares, and undivided earnings of the bank is made the basis, without deducting the value of United States securities or stock in Federal reserve banks held by the bank, does not constitute an illegal tax on such securities."

To the same effect see Pacific Co., Ltd. v. Johnson, State Treasurer, supra, in which it was said by Mr. Justice Stone, writing the opinion of the court, p. 489, L. Ed. 896:

"* * * State laws taxing shareholders of national banks on the full net value of their shares, although the banks own tax-exempt federal securities, have also been consistently upheld.";

citing Van Allen v. Assessors, supra, and other cases.

We think the cases to which reference has been made are not in conflict with MacMillan Co. v. Commonwealth of Massachusetts, 279 U. S. 620, 73 Law Ed. 874, as a careful reading of the case will clearly show. Nor are they in conflict with State of Missouri v. Gehner, 281 U. S. 313, 74 Law Ed. 870.

Governed by the authorities to which we have referred, and from which we have quoted, we are clearly of opinion that no error was committed in the instant case. The tax being clearly assessed upon the shareholders, the defendant is not entitled to any deduction for the United States securities, the Philippine Island bonds, and Joint Stock Land [fol. 68] Bank bonds owned by it, and the contention of the exceptant cannot be sustained.

The fourth question involves the proposition as to whether the defendant is entitled to a flat deduction for the actual value of 160 shares of American Telephone and Telegraph Company, and 200 shares of F. & W. Grand 6½s preferred, owned by the defendant, because these companies

are Pennsylvania corporations paying a capital stock tax. Involved in this question is whether the trust company paying a capital stock tax, is entitled to a flat deduction on the full investment in the shares of Pennsylvania corporations paying a capital stock tax, or only upon the proportion and to the extent that such Pennsylvania corporations have paid such tax.

The defendant relies upon the decision of the United States Supreme Court in the case of Missouri v. Gehrner, 281 U. S. 313, 321, 74 Law Ed. 870; the case of Commonwealth v. Mortgage Trust Co., 227 Pa. 163, and the decision of this court in Commonwealth v. Girard Trust Co., 3 Pa. D. & C. 722, 26 Dauphin County Reports 216, 114 Atl. 368.

In Missouri v. Gehrner, there was an appeal from the judgment of the Supreme Court of the State of Missouri on certiorari to review the action of the State Board of Equalization determining the amount of taxable property of an insurance company owning bonds of the United States. Section 6386 of the Revised Statutes of the State of Missouri provides:

[fol. 69] "The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals. * * *"

Included in the returns made by the insurance company was $94,000 in United States bonds. The board of equalization declined to accept the return and after hearing the parties held that the bonds of the United States are not taxable, that section 6386 contravenes provisions of the state Constitution requiring uniform taxation and that therefore the company was not entitled to deduct the amount of such reserve and claims. The board assessed the company's taxable property at $50,000 without disclosing how it arrived at the amount. The Supreme Court of Missouri held the

action of the board valid; found the company's liabilities were chargeable against all its assets—taxable and nontaxable alike—declared that such reserve and claims should be apportioned between the two classes of assets according to their respective amounts. The board of equalization completely eliminated the bonds from its calculations, and there [fol. 70] is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and non taxable assets. The Supreme Court of the United States held:

"The section discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance companies to cover their legal reserve and unpaid policy claims. It would be competent for the state to permit a less reduction or none at all. But where, as in this case, the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those who own no such bonds, this amounts to an infringement of the guaranteed freedom from taxation. It is clear that the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. That is in violation of the established rule. * * *";

and the judgment was reversed.

In a former part of this opinion we held that this is a tax on shares of stock and not upon the property of the defendant, therefore the Missouri case cannot apply; and a careful reading of this decision discloses that it does not support the contention of the defendant.

Nor do we think the case of Commonwealth v. Mortgage Trust Co., supra, supports defendant's contention. It appears from the opinion of Mr. Justice Elkin, p. 176, that ever since the passage of the Act of 1897 the method of fix- [fol. 71] ing the tax on trust companies has been followed by the Act of 1907 and its amendments which consists, as Judge Elkin points out, of—

"a definite method of ascertaining the actual value of each share was provided, which method consisted in adding together the amount of capital paid in, the surplus and undivided profits and dividing the amount so ascertained by the number of shares. * * * The constitutional mandate only requires taxes to be uniform upon the same class of

subjects. * * * This power was exercised in 1907 by making trust companies a class for the purpose of taxation, and a uniform tax rate and method of ascertaining taxable value applicable to the entire class were provided in that act" (p. 177, 178).

We have discussed the cited case at length in a former part of this opinion and are not convinced that it supports the contention of the defendant.

In the Dauphin County case of Commonwealth v. Girard Trust Co., supra, President Judge Hargest draws this distinction:

"2. There is a plain distinction between the capital stock of a corporation as a whole in the hands of the corporation and the individual shares of the shareholder in his hands: Lycoming County v. Gamble, 47 Pa. 106; Whitesell v. Northampton County, 49 Pa. 526.

"3. There is no such identity between the property and assets of a corporation and its capital stock which requires [fol. 72] the capital stock to be exempted from taxation in the same proportion that the property is exempt: Com. v. Shenango Furnace Co., 268 Pa. 286.

"4. The shares of the capital stock of a corporation are personal property taxable in the hands of the holder unless exempted by law: Callery's Appeal, 272 Pa. 255."

What this court had before it, as we understand the Girard Trust Co. case, was whether the Pennsylvania Railroad Company, which only paid a state tax on 80% of the valuation of its capital stock, was taxable in Pennsylvania on the balance of 20% and we concluded it was.

It is claimed by the commonwealth, however, that the defendant did not prove that it had purchased the stocks in question out of the capital paid in, surplus and undivided profits, and therefore it can claim no deduction therefor under any theory which it may advance. As authority for this contention the commonwealth relies upon Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375, which was in affirmance of the same case reported in 23 Dauphin 244, in which it was held:

"Under the Act of June 13, 1907, P. L. 640, which declares that the value of the capital stock of a corporation shall be ascertained for tax purposes 'by adding together so much of the capital stock paid in, the surplus and undivided profit, as is not invested in shares of stock of corporations' liable to pay a capital stock tax, and dividing this [fol. 73] amount by the number of shares, that which is to be deducted is not all the nontaxable assets held by the company, but only so much thereof as was purchased out of the capital stock paid in, the surplus and undivided profits.

"Although a company may purchase its nontaxable securities from any fund it chooses, yet if it fails to prove purchase of such securities out of capital stock account, the Commonwealth may apportion the value of the securities between 'the capital stock paid in, the surplus and undivided profits' and the other assets of the company, it appearing as far as shown that the price of the securities came from both funds."

Writing the opinion of the Supreme Court it was held by Chief Justice Moschzisker (p. 377):

"The Act of 1907 declares that the value of each share of capital stock 'shall be ascertained and fixed by adding together so much of the capital stock paid in, the surplus and undivided profits, as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or tax on shares, and dividing this amount by the number of shares.' This language is neither doubtful nor uncertain; that which is to be deducted is not all the nontaxable assets held by the company, but only 'so much (thereof as was purchased out) of the capital stock paid in, the surplus and undivided profits.'

"The company claims it has the right to purchase its securities from any fund it chooses, and this is correct. If it had purchased the nontaxable securities referred to, [fol. 74] form a fund composed solely of 'the capital stock paid in, the surplus and undivided profits,' of course the whole value thereof should be deducted; just as, if it had paid therefor wholly out of its other assets, no part of this value would be deductible. Since the company did not prove its purchase of these securities out of capital stock account, the Commonwealth might, perhaps, have refused to allow any deduction whatever, but, instead of doing this,

it adopted the more equitable course of apportioning the value of the nontaxable securities between the two funds, because, so far as shown, the price of them came from both. No statute, authority or principle has been cited questioning the right to do this; and, the result reached being equitable, the trust company lacks just ground of complaint."

We have made a very careful examination and find the Hazelwood Savings & Trust Co. case has not been reversed or reconsidered by the Supreme Court of Pennsylvania.

The defendant did not prove that it had purchased these stocks out of capital paid in, surplus and undivided profits. It may have been very difficult or impossible for the defendant to unscramble depositor's money from the capital stock account and show from which the stock was purchased. This, however, is entirely a matter for the defendant. The defendant not having proven its purchase of these stocks out of capital, surplus, and undivided profits, the Commonwealth might have refused to allow any deduction whatever, but instead it pursued the more equitable course, [fol. 75] as was also done in the Hazelwood Savings & Trust Co. case, supra.

The procedure pursued by the taxing officers with respect to the stock owned by the defendant is detailed very fully in paragraph 1 of the Statement of Facts. There is no dispute about the first two items of the formula. Item $41,667 represents the amount of capital stock paid in, plus the surplus and the undivided profits. The sum of $25,247 represents the appreciation added thereto. From this was deducted the result of the minor fraction, which minor fraction was used to get the proportionate amount to be deducted because of the ownership of stock in other corporations, heretofore referred to. In doing this, the taxing officers pursued the same method identically which was determined to be proper by this court in Com. v. Girard Trust Co., supra.

The Act of 1907, as amended, not only allows a deduction for ownership in shares of stock of corporations liable to pay a capital stock tax or relieved from the payment of capital stock tax, but also to those liable to pay tax on shares. However, only to the extent to which tax on shares had been paid to Pennsylvania is there to be an allowance. No allowance need be made in the case of the ownership of these shares any more than for the ownership of

any other shares, as previously discussed, unless it is proven by the defendant that the shares are purchased out of capital paid in, surplus, and undivided profits. Com. v. Hazelwood Savings & Trust Co., supra.

The same rule was applied by the taxing officers in mak- [fol. 76] ing their determination for deduction purposes in the matter of the 160 shares of the American Telephone & Telegraph, in which it was found, as explained at the bottom of page 2 and top of page 3 of the Statement of Facts, that the taxable value of each share of stock of this company for Pennsylvania capital stock tax was 4 mills, and therefore on 160 shares owned by the defendant, the taxable value for capital stock tax purposes was 64¢. Because this sum was less than a dollar, as agreed in the Statement of Facts, the taxing officers did not use it at all in making up the totals, which totals amounted to $71,373, the multiplicand in the taxing fraction.

Briefly considered, the defendant claims that the method set up by the Act of 1907, whereby the value of the shares was to be ascertained by adding together the amount of the capital stock paid in, the surplus and undivided profits, and dividing the same by the number of shares, was the proper method; that when the Legislature in 1923 amended the Act of 1907 by providing that the value of the shares should be ascertained by adding together "so much of the amount of the capital stock paid in, the surplus and undivided profits, as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares," it set up an invalid method and the Act no longer provided for a tax on shares in the hands of the shareholders; and it further contends, when the Legislature in 1927 further amended the Act of 1907 by adding the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the Commonwealth a capital [fol. 77] stock tax," in the amendment of 1923, it provided for the deduction for shares owned in Pennsylvania corporations in the same manner as the Personal Property Tax Act of June 17, 1913, P. L. 507, and relies in support of its contentions upon Dupuy v. Johns, 261 Pa. 40.

The case of Dupuy v. Johns was in interpretation of the Personal Property Tax Act of June 17, 1913, and we had it under consideration in a former part of this opinion. In

this case the plaintiff, a resident of Pittsburgh, failed to include in his personal property tax return shares owned by him in the Crucible Steel Company of New Jersey. The company had capital stock of seventy-five million, fourteen million of which was employed in Pennsylvania, and all except $29,000 in manufacturing. The company paid a capital stock tax in Pennsylvania only on $29,000. The plaintiff brought a bill to restrain the collection of the assessment against him of 61/75 of the value of the stock, being the proportionate part of the stock which represented property outside of Pennsylvania, claiming that his shares were fully exempt under section 1 of the Act of 1913, P. L. 507. The Supreme Court sustained this contention; it held that in the case of personal property tax where the foreign corporation was liable for any capital stock tax, or was relieved from capital stock tax or tax on shares, the entire shares owned by the individual were exempt. We think this case has no application to the instant case where we are dealing with the ownership of shares of stock by a trust company under a method of classification for taxation purposes expressly provided for trust companies by the Act of 1907, as amended.

We are not able to follow the contention of the defendant that the amendments to the Act of 1907 by the Acts [fol. 78] of 1923 and 1927 changed the nature of the tax from a tax on shares to a capital stock tax and that the bank would therefore be entitled to a full deduction for shares owned. That contention is clearly established to be erroneous by the decisions in Com. v. Mortgage Trust Co., supra, Com. v. Union Trust Co., supra, and Com. v. Girard Trust Co., supra, where Judge Hargest had the case of Dupuy v. Johns under consideration, and stated that the learned justice who wrote the opinion in Dupuy v. Johns "stated that it is by no means unique or unprecedented in our tax system to relieve the holder of stock to the full amount of the value of the shares, and illustrated this proposition by saying that 'shareholders of the Pennsylvania Railroad, for example, are relieved from individual taxation on the stock of that company, because the corporation itself pays a State tax on capital' ", to which Judge Hargest replies:

"This, however, is not the policy or the practice with reference to trust companies. Trust companies are only re-

lieved from taxation in the proportion that a capital stock tax has been paid upon the shares of stock held by them. The Auditor General's Department has construed the language of the Act of 1907, relieving trust companies on so much of their capital, surplus and undivided profits 'as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,' and has determined that—to use the stock of the Pennsylvania Railroad as an example—where the Pennsylvania Railroad pays only 80 per cent. tax on the value of its shares, the 20 per cent. invested in those shares 'is not in- [fol. 79] vested in shares of stock of corporations liable to pay' a capital stock tax. * * *"

He therefore concluded (26 Dauphin p. 225):

"If there were no difference between the exemption allowed to an individual and the exemption allowed to a trust company on holdings of the shares of corporations, and no difference whether the holdings were in foreign or domestic corporations, it would be very difficult to distinguish the case of Dupuy v. Johns from the case before us. * * *"

This last sentence is the straw upon which most of the contention of the defendant in this case has been built. Because of the fact that the Legislature in the amendment of 1927 inserted the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the commonwealth a capital stock tax", it is contended that the amendments to the Act of 1907 are similar to the exemption provision of the Act of 1913, and therefore Dupuy v. Johns should apply. Judge Hargest himself stated the answer to his own statement just quoted when he immediately said (26 Dauphin p. 225):

"But we have just pointed out that the language of the Trust Company Act of 1907 requires such companies to pay a tax on such of its holdings 'as is not invested in the shares of stock of corporations liable to pay a capital stock tax.' In the application of the principle that where the taxpayer or his property is within the general language of the statute imposing the tax the exempting provision should be [fol. 80] strictly construed, there are strong reasons for holding that trust companies are not exempt from investments in the shares of corporations to the extent that those

corporations have not paid a capital stock tax. The exemption contained in the personal property act is quite different. It provides 'that shares of stock of a corporation are liable to tax except shares of stock * * * that may be liable to a tax on its shares or its capital stock for State purposes * * * or relieved from the payment of a tax on its shares or capital stock for State purposes by the laws of this Commonwealth.' ''

It will be observed therefore that the Act of 1913 excepts certain shares and sets up a new class, according to Dupuy v. Johns, supra, granting full exemption on shares of stock liable to pay a tax on its shares or its capital stock, etc., on the ground that it is not intended under the Personal Property Tax Act that a share shall be divisible. But with respect to trust companies "the Legislature", as Mr. Justice Elkin said in the Mortgage Trust Company case, "in 1907, made a new class of taxable subjects and provided in express terms a definite method of determining the actual value of the shares of stock belonging to this taxable class." By the addition of the words "so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares," it has been determined that the shares are divisible, and that the trust company is only entitled to a deduc- [fol. 81] tion for shares owned by it in other corporations to the extent that a capital stock tax has been paid: Com. v. Girard Trust Co., supra.

For the reasons herein expressed we are not able to follow the contention of the defendant. For further authority see Callery's Appeal, 272 Pa. 255, 266, where it was said by Mr. Justice Kephart, referring to the Personal Property Tax Act of 1913, as follows:

"Though such intrinsic value of shares may be out of the state * * * shares of a corporation held by a domestic corporation are not taxed under a personal property tax."

It is further contended by counsel for the defendant that the sum of $71,373 in the taxing fraction was not the value of exempt and nontaxable shares of stock owned by the

defendant. This sum of $71,373 represents the value of shares of stock owned by the trust company upon which a tax has been paid. If all of the shares of stock of other corporations owned by the trust company were purchased out of capital stock, surplus and undivided profits, the defendant trust company would be entitled to deduction only to the extent that tax has already been paid upon such shares, and would not be entitled to deduction on basis of market value of $155,989: Com. v. Girard Trust Co., supra. But, what stocks of other corporations owned by the trust company have been proved to have been purchased out of capital stock, surplus and undivided profits? In other words, the trust company is not entitled to any deduction for shares of stock owned unless it can prove that said [fol. 82] shares were purchased out of and are represented by capital stock, surplus and undivided profits. However, the taxing officers, as we have heretofore stated, did not stand on this technical ground, but pro-rated capital stock, surplus and undivided profits, to total assets, and applied this apportionment to $71,373. The trust company did not prove that it was entitled to any deduction. The taxing officers allowed an equitable deduction of $8,886, under an apportionment theory approved by the Supreme Court of Pennsylvania in the Hazelwood Savings & Trust Co. case. It therefore appears that the trust company was given a deduction for a portion of the capital stock, surplus and undivided profits when it did not prove that it was entitled to any deduction.

It is claimed by the defendant that by the amendment of 1923 there is a discrimination against the United States securities, Philippine Island bonds, and Joint Stock Land Bank bonds, owned by the defendant. We are of opinion this this contention is not sound. There is no discrimination against other assets of the trust company when the trust company act and its amendments provide for deduction of that portion of capital stock, surplus, and undivided profits invested in shares of corporations liable to pay or relieved from payment of capital stock tax to the commonwealth. The sole purpose of this exemption clause was to avoid double taxation. It is a well established policy in Pennsylvania not to impose a tax upon both the capital stock of an ordinary corporation, and upon the shares of stock in the hands of the shareholders; nor upon both the assets and property of a trust company, and upon the

shares of stock of the trust company in the hands of share-[fol. 83] holders. It is the policy of the commonwealth to tax one or the other—in the case of ordinary or industrial corporations, the capital stock of the company; in the case of trust companies, the shares of the trust company in the hands of the shareholders. With this well established policy in mind we fail to discover any discrimination on the part of the taxing officers.

In conclusion, the last objection in the specification of objections filed in this case, it is claimed that if the tax in question is a tax on shares, then the 166 shares of stock of the defendant owned by non-residents are not subject to the tax. In the Stipulation of Facts it is agreed that 166 shares of defendant's stock are owned by non-residents of Pennsylvania.

The Act of 1907 as last amended by the Act of 1929 P. L. 673, requires every insurance or trust company incorporated in Pennsylvania under the provisions of the Acts therein referred to, to report on or before a certain date to the Department of Revenue setting forth *"the full number of shares of the capital stock subscribed for or issued by such company"*. Having made this report it became the duty of the Department of Revenue to assess *"such shares* for taxation at the rate of five mills upon each dollar of the actual value of *each share of stock"* to be ascertained as provided in the act. We quote also from a part of section 1 which provides: "That upon the payment of the tax fixed by this Act into the State Treasury, through the Department of Revenue, the *shares* • • • shall be exempt from all other taxation under the laws of this Commonwealth." We think this clearly imposes a tax on all of the shares of the stock of trust companies in the hands [fol. 84] of the stockholders, whether they are resident or non-resident. We have discussed this matter in a former part of this opinion which discussion need not be repeated here.

In Corry v. City of Baltimore, 196 U. S. 466, 474, it was held:

"That it was rightly determined that it was within the power of the state to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or non-residents, is so conclusively settled by the prior adjudications of this court that the subject is not

open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject."

We think we have discussed all of the questions involved in this appeal and our conclusions thereon are supported by ample authority in the opinions of the Supreme Court of the United States, the Supreme Court of Pennsylvania, and this court. We are of opinion, therefore, that the objections filed by the defendant to the settlement of the tax on the shares of stock of the Schuylkill Trust Company must be overruled and dismissed.

Governed by the authorities to which we have referred we have reached the following—

Conclusions of Law

1. The tax imposed by the Act of June 13, 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673, [fol. 85] is a tax upon the shareholders' holding of stock.

2. The tax imposed upon trust companies by the Act of 1907 as amended is not a tax on personal property nor a tax on the assets of the trust company but a tax upon the shares held by the shareholders of such trust company.

3. The tax being clearly assessed upon the shares of capital stock in the hands of its shareholders, the defendant is not entitled to any deduction for the United States securities, the Philippine Island bonds, and Joint Stock ~~Land~~ Bank bonds owned by it.

4. There is a plain distinction between the capital stock of a corporation as held in the hands of the corporation and the individual shares of the shareholder in his hands.

5. Although a company may purchase its non-taxable securities from any fund it chooses yet if it fail to prove purchase of such securities out of the capital stock account the commonwealth may apportion the value of the securities between "the capital stock paid in, the surplus, and undivided profits" and the other assets of the company.

6. In the Act of 1907 the Legislature made a new class of taxable subjects and provided in express terms a definite method of determining the actual value of the shares of stock belonging to this taxable class.

[fol. 86] 7. Under the Act of 1907 as amended there is no discrimination against other assets of the company when the trust company act and its amendments provide for deduction of that portion of the capital stock, surplus, and undivided profits invested in the shares of corporations liable to pay or relieved from payment of capital stock tax to the commonwealth. The sole purpose of this exemption clause was to avoid double taxation.

8. The Act of 1907 as amended imposes a tax on all the shares of the stock of trust companies in the hands of the stockholders whether they are resident or non-resident.

Statement

Amount of tax	$2290.14
Payment on account	570.43
Balance due Commonwealth	$1719.71
Interest from April 8, 1933, being 60 days after date of settlement	54.74
Total	$1774.45
Attorney General's Commission of 5%	88.72
Amount now due	$1863.17

[fol. 87] JUDGMENT

And now, October 19, 1933, judgment is hereby directed to be entered in favor of the Commonwealth and against Schuylkill Trust Company for the sum of $1863.17, unless exceptions be filed within the time limited by law.

Frank B. Wickersham, A. L. Judge, for the Court en Banc.

IN COURT OF COMMON PLEAS

EXCEPTIONS OF THE SCHUYLKILL TRUST COMPANY, DEFENDDNT

And Now, November 16, 1933, the Schuylkill Trust Company, defendant above named, by its attorney, John Robert Jones, excepts to the conclusions of law, the rulings on re-

quests for conclusions of law and the judgment directed to be entered by the learned court and specifies the following exceptions thereto:

1. The learned court erred in its answer to the defendant's 3rd Request for Conclusions of Law which Request and answer of the court thereto read as follows:

Request:

"3. Shares of stock are intangible personal property, a tax imposed upon them is a personal property tax and their situs for taxation is the domicile of their owner, hence shares [fol. 88] of stock owned by non-residents of Pennsylvania are not subject to tax except in the case of shares of stock issued by national banks located in the State, the authority to tax which national bank shares owned by non-residents and residents of the State being given by United States Revised Statutes, Section 5219."

Answer of the court: "Refused."

2. The learned court erred in its answer to the defendant's 4th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"4. The tax imposed by the Act of April 25, 1929, P. L. 673, is not a tax upon the stockholders' interest in the shares. Under the method provided in the said act to determine the value to which the rate of tax is directed to be applied there is a diminution from the amount of capital stock paid in, surplus and undivided profits of the trust company by reason and on account of the kind of assets which constitute the property and capital stock of the trust company."

Answer of the court: "Refused."

3. The learned court erred in its answer to the defendant's 5th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

[fol. 89] Request:

"5. The tax imposed by the Act of April 25, 1929, P. L. 673, is not a tax upon the stockholders' interest in the shares, for the reason that though the interest of the stock-

holder be the same in the case of two or more trust companies, the tax is not the same in each such case, the difference in taxable value and consequent difference in tax being caused by the amount and value of the assets owned by each trust company which are exempted under the provisions of the act."

Answer of the court: "Refused."

4. The learned court erred in its answer to the defendant's 6th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"6. The tax imposed by the Act of April 25, 1929, P. L. 673, is not imposed upon the shareholders' interest but upon assets owned by the trust company, the taxable value of which is determined by deducting and eliminating from consideration the full value of the assets which are exempted by the said act and assets which the state has no jurisdiction to tax."

Answer of the court: "Refused as stated."

5. The learned court erred in its answer to the defendant's 7th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

[fol. 90] Request:

"7. The amount of capital stock paid in, the surplus and undivided profits of the trust company being the difference between the value of the total assets and the amount of assets sufficient to cover liabilities to others than stockholders, it is required by the Act of April 25, 1929, P. L. 673, that in determining the taxable value to which the rate of tax is directed to be applied, assets in an amount sufficient to cover liabilities to others than stockholders be deducted from the value of the total assets of the defendant trust company."

Answer of the court: "Refused as stated."

6. The learned court erred in its answer to the defendant's 8th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"8. In determining the taxable value to which the rate of tax is to be applied under the Act of April 25, 1929, P. L. 673, the trust company must be regarded as though it did not own the assets which are declared by the act to be exempt and therefore shares of stock issued by corporations 'liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares' must be deducted at their full value from the value of the total assets of the defendant trust company."

Answer of the court: "Refused."

[fol. 91] 7. The learned court erred in its answer to the defendant's 9th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"9. In determining the taxable value to which the rate of tax is to be applied under the Act of April 25, 1929, P. L. 673, the trust company must be regarded as though it did not own the assets which are non-taxable such as United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, therefore such securities and bonds must be deducted at their full value from the value of the total assets of the defendant trust company."

Answer of the court: "Refused."

8. The learned court erred in its answer to the defendant's 10th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"10. Assets owned by the defendant trust company consisting of shares of stock issued by national banks being subject to tax at their actual net asset value under the Act of July 15, 1897, P. L. 292, as amended, against their owner, the defendant, such national bank shares cannot be made the basis directly or indirectly, of other or further taxation and therefore in determining the taxable value to which the [fol. 92] rate of tax is directed to be applied under the Act of April 25, 1929, P. L. 673, such shares must be deducted at their full value from the value of the net assets, that is,

from the sum of the amount of capital stock paid in, surplus and undivided profits of their owner, the defendant."

Answer of the court: "Refused."

9. The learned court erred in its answer to the defendant's 11th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"11. Since under and by the provisions of the Act of April 25, 1929, P. L. 673, the value of the assets to which the rate of tax is directed to be applied is determined by an express deduction, elimination and exemption of shares of stock issued by corporations 'liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares,' and since under the said act as construed and applied by the Commonwealth and the resettlement of tax made against this defendant under the alleged authority of the said act there is no deduction, elimination or exemption of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by this defendant of the value of $151,207, the said Act of April 25, 1929, P. L. 673, as construed by the taxing officials of the Commonwealth and the resettlement of tax made against this defendant under the alleged authority of [fol. 93] the said Act of Assembly discriminate in favor of the said described shares of stock exempted under the provisions of the said act and against the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds."

Answer of the court: "Refused."

10. The learned court erred in its answer to the defendant's 12th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"12. Under the provisions of the Act of April 25, 1929, P. L. 673, as construed by the taxing officials of the Commonwealth in the said resettlement of tax made against this defendant, tax is imposed upon the United States securities,

Philippine Islands bonds and Joint Stock Land Bank bonds of the total value of $151,207."

Answer of the court: "Refused."

11. The learned court erred in its answer to the defendant's 13th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"13. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the [fol. 94] resettlement of tax made against the defendant impose a tax upon United States bonds and securities of the market value of $134,907, impose a tax upon instrumentalities of the United States Government, violate Section 3701 Revised Statutes, 31 U. S. C., Section 742, and are a violation of Clause 2 of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that 'All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;' and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws."

Answer of the court: Refused."

12. The learned court erred in its answer to the defendant's 14th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"14. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant impose a tax upon Philippine Islands 5½% Public Improvement Loan due Aug. 1, 1941, Act of Philippine Legislature Number 2940, bonds, of the market value of $10,900, violate the provisions of the Act of Congress of August 26, 1916, Act [fol. 95] of Congress of July 21, 1921 and Act of the Philippine Legislature Number 2940 approved February 5, 1921, the Act of Congress of February 6, 1905, chap. 453, Vol. 33, U. S. Statutes at Large, part 1, page 689, and are a viola-

tion of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that 'All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;' and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws."

Answer of the court: "Refused."

13. The learned court erred in its answer to the defendant's 15th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"15. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to the defendant and the resettlement of tax made against the defendant impose a tax upon Joint Stock Land Bank bonds of the market value of $5,400 impose a tax upon instrumentalities of the United States Government, violate the provisions of 'The Federal Farm Loan Act' of the United State- Congress of July 17, [fol. 96] 1916 (Chap. 245, 39 U. S. Statutes at Large, p. 360 et seq. Sec. 16) and are a violation of Section 8 of Article I of the Constitution of the United States, Section 1 of Article IX of the Constitution of Pennsylvania which requires that 'All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws'; and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws."

Answer of the court: "Refused."

14. The learned court erred in its answer to the defendant's 16th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"16. The Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and

the resettlement of tax made against the defendant wherein Philadelphia National Bank shares of the value of $20,202 were not deducted from the value of the net assets of the defendant and not eliminated entirely from consideration in determining the taxable value to which the rate of tax was applied discriminate against and impose a tax upon the said shares of stock and violate the provisions of Section 5219 of the Revised Statutes of the United States. Such shares of stock being subject to tax under the Act of [fol. 97] July 15, 1897, P. L. 292, as amended, against their owner, they cannot be made the basis, directly or indirectly, of any other or further taxation."

Answer of the court: "Refused."

15. The learned court erred in its answer to the defendant's 17th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"17. The Commonwealth being required by the provisions of Section 5219 of the Revised Statutes of the United States to deduct the value of the Philadelphia National Bank shares owned by the defendant from the value of the net assets, that is, from the amount of capital stock paid in, surplus and undivided profits, is required in order to preserve uniformity of taxation to make a similar deduction of all of the exempt assets of the defendant of the total value of $155,989 consisting of 'shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares,' and by its failure to make such deduction the Act of April 25, 1929, P. L. 673, as construed and applied by the Commonwealth to this defendant and the resettlement of tax made against the defendant violate Section 1, Article IX of the Constitution of Pennsylvania which requires that 'All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority [fol. 98] levying the tax, and shall be levied and collected under general laws;' and the 14th Amendment to the Constitution of the United States by depriving the defendant of its property without due process of law and denying to it the equal protection of the laws."

Answer of the court: "Refused."

16. The learned court erred in its answer to the defendant's 18th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"18. The tax imposed by the Act of April 25, 1929, P. L. 673, should have been settled against this defendant trust company upon a taxable value determined by deducting from the value of the total assets in the amount of $3,755,882. (1) assets sufficient to cover liabilities to others than stockholders in the amount of $3,334,599.93 (2) the full value of the exempt shares of stock described in the act, including the value of the Philadelphia National Bank shares, in the amount of $155,989 and (3) the value of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds in the amount of $151,207, thereby leaving a taxable value in the amount of $114,086.07, tax upon which at the rate of five mills is $570.43."

Answer of the court: "Refused."

[fol. 99] 17. The learned court erred in its answer to the defendant's 19th Request for Conclusions of Law, which Request and answer of the court thereto read as follows:

Request:

"19. The defendant having paid tax to the Commonwealth in the amount of $570.43, no tax is owing to the Commonwealth and judgment should be entered in favor of the defendant with costs."

Answer of the court: "Refused."

18. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"* * *; the method used in arriving at the tax is not objected to; and the only question is whether or not the accounting officers have included as taxable certain shares and securities which the defendant claims are exempt, and whether the tax involved is a tax on shares or a tax on personal property."

19. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"* * * the Act of 1907 and its amending acts constitute one piece of legislation upon the subject contained in the first act—in this instance the Act of 1907, * * *"

20. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

[fol. 100] "It must be observed that this procedure was not an effort on the part of the taxing authorities to levy a tax upon these federal securities; the only purpose was to arrive at the value of the shares for we have heretofore determined that the tax imposed upon trust companies by the Act of 1929 was not a tax on personal property, nor a tax on the assets of the corporation, but a tax upon the shares held by the shareholders of said trust company. We are of opinion, therefore, that when the taxing officers of the Commonwealth of Pennsylvania refused to deduct the value of these federal securities from the total assets of the trust company they were acting strictly in accordance with the law as defined by the Supreme Court of the United States."

21. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"* * *, we are clearly of opinion that no error was committed in the instant case. The tax being clearly assessed upon the shareholders, the defendant is not entitled to any deduction for the United States securities, the Philippine Island bonds, and Joint Stock Land Bank bonds owned by it, and the contention of the exceptant cannot be sustained."

22. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"The Act of 1907, as amended, * * * allows a deduction * * *, only to the extent to which tax on shares has been paid to Pennsylvania. * * * No allowance [fol. 101] need be made in the case of the ownership of these shares any more than for the ownership of any other shares, as previously discussed, unless it is proven by the defendant that the shares are purchased out of capital paid in, surplus, and undivided profits: * * *"

23. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"By the addition of the words 'so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved

from the payment of capital stock tax or tax on shares,' it has been determined that the shares are divisible, and that the trust company is only entitled to a deduction for shares owned by it in other corporations to the extent that a capital stock tax has been paid: * * *"

24. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"* * *, the trust company is not entitled to any deduction for shares of stock owned unless it can prove that said shares were purchased out of and are represented by capital stock, surplus and undivided profits."

25. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"There is no discrimination against other assets of the [fol. 102] trust company when the trust company act and its amendments provide for deduction of that portion of capital stock, surplus, and undivided profits invested in shares of corporations liable to pay or relieved from payment of capital stock tax to the commonwealth."

26. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"The Act of 1907 as last amended by the Act of 1929, P. L. 673, * * * clearly imposes a tax on all of the shares of the stock of trust companies in the hands of the stockholders, whether they are resident or non-resident."

27. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"* * * We are of opinion, therefore, that the objections filed by the defendant to the settlement of the tax on the shares of stock of the Schuylkill Trust Company must be overruled and dismissed."

28. The learned court erred in its 1st Conclusion of Law which reads as follows:

"1. The tax imposed by the Act of June 13, 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673, is a tax upon the shareholders' holding of stock."

29. The learned court erred in its 2nd Conclusion of Law which reads as follows:

[fol. 103] "2. The tax imposed upon trust companies by the Act of 1907 as amended is not a tax on personal property nor a tax on the assets of the trust company but a tax upon shares held by the shareholders of such trust company.'

30. The learned court erred in its 3rd Conclusion of Law which reads as follows:

"3. The tax being clearly assessed upon the shares of capital stock in the hands of its shareholders, the defendant is not entitled to any deduction for the United States securities, the Philippine Island bonds, and Joint Stock Land Bank bonds owned by it."

31. The learned court erred in its 5th Conclusion of Law which reads as follows:

"5. Although a company may purchase its nontaxable securities from any fund it chooses yet if it fail to prove purchase of such securities out of the capital stock account the commonwealth may apportion the value of the securities between 'the capital stock paid in, the surplus, and undivided profits' and the other assets of the company."

32. The learned court erred in its 7th Conclusion of Law which reads as follows:

"7. Under the Act of 1907 as amended there is no discrimination against other assets of the company when the trust company act and its amendments provide for deduction of that portion of the capital stock, surplus, and undi- [fol. 104] vided profits invested in the shares of corporations liable to pay or relieved from payment of capital stock tax to the commonwealth. The sole purpose of this exemption clause was to avoid double taxation."

33. The learned court erred in its 8th Conclusion of Law which reads as follows:

"8. The Act of 1907 as amended imposes a tax on all the shares of the stock of trust companies in the hands of the stockholders whether they are resident or non-resident."

34. The learned court erred in its conclusion of law entitled "Statement" which reads as follows:

"Statement"

"Amount of tax	$2290.14
Payment on account	570.43
Balance due Commonwealth	$1719.71
Interest from April 8, 1933, being 60 days after date of settlement	54.74
Total	$1774.45
Attorney General's Commission of 5%	88.72
Amount now due	$1863.17"

35. The learned court erred in directing the following "Judgment" to be entered:

"Judgment"

"And now, October 19, 1933, judgment is hereby directed to be entered in favor of the Commonwealth and against [fol. 105] Schuylkill Trust Company for the sum of $1863.17, unless exceptions be filed within the time limited by law.

Frank B. Wickersham, A. L. Judge for the Court en Banc."

36. The learned court erred in not directing judgment to be entered in favor of the Schuylkill Trust Company, the defendant, and against the Commonwealth of Pennsylvania, the plaintiff, together with costs.

John Robert Jones, Attorney for the Defendant.

IN COURT OF COMMON PLEAS

OPINION OVERRULING EXCEPTIONS

By the COURT:

After careful consideration of the many exceptions filed to the opinion and findings of the court we have modified our opinion and findings as follows:

As to Exception No. 20, our opinion and findings are modified to read as follows:

"It must be observed that this procedure was not an effort on the part of the taxing authorities to levy a tax

upon these federal securities; the only purpose was to arrive at the taxable value of the shares for we have heretofore determined that the tax imposed upon trust companies by the Act of 1929 was not a tax on personal prop-
[fol. 106] erty within the meaning of the Personal Property Tax Act of June 17, 1913, P. L. 505, nor a tax on the assets of the corporation, but a tax upon the shares held by the shareholders of said trust company. We are of opinion, therefore, that when the taxing officers of the Commonwealth of Pennsylvania refused to deduct the value of these federal securities from the total assets of the trust company they were acting strictly in accordance with the law as defined by the Supreme Court of the United States."

As to Exception No. 29, our finding in that case is modified so as to read as follows:

"The tax imposed upon trust companies by the Act of 1907 as amended is not a tax on personal property within the meaning of the Personal Property Tax Act of June 17, 1913, P. L. 505, nor a tax on the assets of the trust company but a tax upon the shares held by the shareholders of such trust company."

Each of the remaining exceptions is hereby severally and specifically overruled. Judgment is entered as directed in the original opinion filed and dated October 19, 1933.

Frank B. Wickersham, A. L. Judge.

[fol. 107] IN COURT OF COMMON PLEAS

SUPPLEMENTAL ORDER

And now, November 24, 1933, by request of counsel for the defendant we make the following order, supplemental to the order above stated, to wit: Exceptions to our modified ruling on Exceptions Nos. 20 and 29 are also overruled, and the following order is now made:

And now November 24, 1933, it is the final order, judgment and decree of the court that each of the exceptions be and is hereby overruled.

By the Court:

Frank B. Wickersham, A. L. Judge.

IN COURT OF COMMON PLEAS

FINAL JUDGMENT—November 24, 1933

"And now, November 24, 1933, by request of counsel for the defendant we make the following order, supplemental to the order above stated, to wit: Exceptions to our modified ruling on Exceptions Nos. 20 and 29 are also overruled, and the following order is now made:

"And now November 24, 1933, it is the final order, judgment and decree of the court that each of the exceptions be and is hereby overruled.

By the Court:

Frank B. Wickersham, A. L. Judge.

[fol. 108] IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

OPINION—Filed June 30, 1934

FRAZER, C. J.:

The Schuylkill Trust Company, located in Pottsville, appeals from a judgment of the Court of Common Pleas of Dauphin County affirming a re-settlement of an account for tax on shares of capital stock of the corporation made by the Board of Finance and Revenue for the year 1930. The tax in question was levied under authority of the Act of June 13, 1907, P. L. 640 as last amended by the Act of April 25, 1929, P. L. 673, and amounts to $2,290.14, based upon a taxable value of defendant's shares estimated at $458,028. The Act of 1929, supra, provides in section 1 that "it shall be the duty of the Department of Revenue to assess such shares [of trust companies] for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares." The method followed in this case in computing the actual value of the shares of stock of appellant subject to tax was

approved by this Court in Commonwealth v. Hazlewood Savings & Trust Co., 271 Pa. 375, i. e. by permitting the [fol. 109] trust company to deduct from the value of its capital stock, undivided profits and increased market value a proportionate amount of the value of stock in other corporations owned by it upon which a tax had already been paid or which was relieved from taxation. Appellant contests the validity of the settlement on several grounds which can be conveniently grouped under three headings.

First, appellant contends that in estimating the taxable value of its shares, the market value of the shares of stock in other corporations owned by it should be deducted from the value of its capital stock, surplus and undivided profits. This argument was rejected in the Hazlewood Savings & Trust case, supra, for reasons which need not be repeated here. The amendments made to the Act of 1907 P. L. 640 since the decision in the case cited above do not alter the force or effect of the conclusion there reached. Appellant has not indicated that the stock it holds in other corporations was purchased out of "the capital stock paid in, the surplus and undivided profits" and in the absence of such proof, an apportionment of the value of the tax paid or non-taxable securities between the fund just stated and the total assets was entirely equitable.

Secondly, appellant complains that the value of United States securities, Philippine Island bonds, and Joint Stock Land Bank bonds held by it was not deducted from the value of the shares in determining the taxable value. These securities are listed with a value of $151,207 and are included in the total assets of $3,755,882. There was no infringement of the immunity from taxation of government securities for the reason that the tax here in question was [fol. 110] levied upon the shares qua shares and not upon the assets of the corporation. Northern Trust Co. v. McCoach, 215 Fed. 991. See also Merchants' & Manufacturers' National Bank of Pittsburgh v. Pennsylvania, 167 U. S. 461 and Van Allen v. The Assessors, 70 U. S. 573.

Appellant also objects to the refusal of the Board of Finance and Revenue to deduct the whole value of shares in the Philadelphia National Bank owned by it. This question was not raised in the original specification of objections and was not discussed by the court below; consequently it will not be considered here. Commonwealth v. Philadelphia City and County, 157 Pa. 550. It should be noted in passing,

however, that in estimating the value of appellant's securities upon which a tax was paid or which were exempt from tax, for purposes of apportionment between the total assets and the value of the capital stock, surplus and undivided profits, the tax officers of the Commonwealth included the Philadelphia National Bank stock at its full value, namely $20,202.

Lastly, appellant argues that even though the tax in question in this proceeding be a tax on shares rather than a tax on the assets of the trust company, there is no jurisdiction in the Commonwealth of Pennsylvania to levy a tax on 166 shares owned by non-residents. The authorities relied upon by counsel for appellant do not sustain this proposition. Commonwealth v. Standard Oil Company, 101 Pa. 119 was a capital stock tax case and does not impinge upon our decision here. Dupuy v. Johns, 261 Pa. 40 relates to personal property tax levied under the Act of June 17, 1913, P. L. 507 and is likewise not in point. Nor is the tax here in question [fol. 111] within the prohibition against double taxation enunciated by the decisions of the United States Supreme Court in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 and First National Bank of Boston v. Maine, 284 U. S. 312, for those cases concern the imposition of transfer inheritance taxes upon choses in action at the death of the owner and can have no application here. The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of resident or non-resident owners is clearly upheld in Corry v. Baltimore, 196 U. S. 466, where it is said, pages 476,477: "* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation." We are of opinion the Act of 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673 establishes the situs of the shares of appellant in Pennsylvania for the purpose of taxation within the meaning of the act.

The assignments of error are overruled and the judgment is affirmed.

[File endorsement omitted.]

[fol. 112] IN SUPREME COURT OF THE UNITED STATES

OPINION—November 11, 1935.

Mr. Justice ROBERTS delivered the opinion of the Court:

The appellant, a trust company organized under the laws of Pennsylvania, challenges a statute of the State as construed and applied in the assessment of a tax for the year 1930, denominated a tax on shares. From a settlement made against the company by the Department of Revenue an appeal was taken to the Court of Common Pleas of Dauphin County which, after trial without a jury, entered judgment in favor of the Commonwealth.[1] The Supreme Court of Pennsylvania affirmed the judgment.[2] The appellant's contention is that the Act as so construed and applied by the Department and the courts discriminates against United States Government bonds, bonds of Federal instrumentalities, and national bank stocks included in the appellant's assets. The appellee replies that the tax is upon the shares of stock as such and not upon the assets which represent their value; that, in fact, no tax whatever, much less a discriminatory tax has been levied upon exempt assets of the company.

Prior to the year 1907 Pennsylvania trust companies were liable for what is known as a capital stock tax, levied upon the corporation. In the administration of that form of exaction certain securities, such as United States bonds and [fol. 113] national bank shares, are eliminated from tax by deduction of their value from the value of the total assets of the corporations which own them. The deduction of exempt securities is made to avoid double taxation, the theory being that the shares issued by a corporation and its capital stock are identical so that taxation of the one is taxation of the other.[3]

On June 13, 1907, the General Assembly adopted an act prescribing another method of taxation in the case of trust companies. Its pertinent provisions are copied in the mar-

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[1] 38 Dauphin County Reports, 22.

[2] 315 Pa. 429.

[3] Com. v. Standard Oil Co., 101 Pa. 119, 145; Com. v. Fall Brook Coal Co., 156 Pa. 488; Com. v. Penna. R. R. Co., 297 Pa. 308, 314; Com. v. Eastern Securities Co., 309 Pa. 44.

gin.[4] This statute in terms lays a tax upon shares rather than upon corporate assets. The value of each share is to be ascertained by adding the value of capital stock paid in, surplus, and undivided profits, and dividing the total by the number of outstanding shares. Thus the exaction is measured by the value of the company's net assets. This involves the exclusion of corporate liabilities from the measure of value to which the rate is to be applied.[5] By successive amendments it was directed that the value of each share of stock should be ascertained by adding together so much of the amount of capital stock paid in, surplus, and undivided profits as is not invested in the shares of stock of cor- [fol. 114] porations liable to pay to the Commonwealth a capital stock tax or tax on shares, or relieved from the payment of capital stock tax or tax on shares, and dividing the sum by the number of outstanding shares.[6] These amendments were combined with the original act, in a single statute of April 25, 1929.[7]

Obviously the theory of the amendments was that as trust companies, so long as they had been liable for capital stock tax, had been exempted from payment of tax reckoned upon assets which had already paid a tax or were exempt from

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[4] "Section 1. That from and after the passage of this act, every company * * * shall * * * make to the Auditor General a report in writing * * * setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. * * *"

[5] Com. v. Trust Company, 237 Pa. 353, 355, 356.

[6] Act of July 11, 1923, P. L. 1071-72. Act of May 7, 1927, P. L. 853, 855.

[7] P. L. 673. The Act of April 9, 1929, P. L. 343, Sections 807 and 1705, (the so-called Fiscal Code) did not alter the substance of the law but merely effected the executive agencies which were to administer it.

tax,—that is, the stock of corporations of Pennsylvania which had paid a capital stock tax or whose shares had been taxed or had been exempted from tax,—it was proper, in levying a tax upon the shares of trust companies reckoned upon the net assets of those companies, to exempt from such net assets so much thereof as represented shares of corporations which had already paid a tax or, under the policy of the Commonwealth had been exempted.

The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.[8]

[fol. 115] It will be observed that by the amendments to the Act of 1907 the measure of the tax is not in any sense the value of the shares as such but a value reflected by so much of the net assets as is not represented by shares of Pennsylvania corporations already taxed or exempt from tax. In the administration of the act as amended the procedure which has been followed and approved[9] is first to deduct the liabilities from the total assets, thus arriving at the net assets. The theory has been that exempt shares owned by the trust company must be shown to have been actually purchased out of capital stock or surplus in order to obtain a deduction of their full value from the gross assets. If the company is unable to demonstrate that they were purchased in that manner then a proportional method of deduction is adopted. This is to apply to the taxed value of all such exempt securities a fraction the numerator of which is the net assets and the denominator the gross assets. The result of applying this fraction to the taxed value of exempt shares is said to give the proportion of those exempt shares attributable to capital, surplus, and undivided profits, and the quotient is accordingly deducted from the value of the net assets to obtain the measure of the tax on all the shares, and this divided by the number of outstanding

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[8] Van Allen v. Nolan, 3 Wall. 573; Cleveland Trust Company v. Lander, 184 U. S. 111; Des Moines National Bank v. Fairweather, 263 U. S. 103.

[9] Com. v. Hazlewood Savings and Trust Company, 271 Pa. 375.

shares, gives the measure of the tax for each share. In the instant case the trust company held amongst its assets shares of Pennsylvania corporations, exempt from tax, of the value of $135,787. It also held shares of the Philadelphia National Bank of the value of $20,202. These were found by the Department of Revenue to have been taxed at a total taxable value of $71,373. Applying the fractional formula mentioned it was found that $8,886 of their taxable [fol. 116] value should be attributed to capital, surplus and undivided profits, and deducted from the amount of the net assets. As the net assets had been ascertained to be $467,714 the deduction brought this figure down to $458,028 to which the rate of tax of five mills was applied.

It should be stated that under the Act the corporation is required to make a report as the basis for the calculation of the tax and, upon that report, the Department of Revenue settles the tax which is assessed against the corporation. The trust company, and not the stockholders, is liable in the first instance for the tax. Though given the right to pay the tax from its funds or to collect the amount from its stockholders, neither the company nor the Commonwealth is given any lien upon the stock for the amount of the tax. As the obligation to pay the Commonwealth is that of the company, its interest and its right to contest are beyond question.

In specifications of objection filed with its appeal from the tax settlement in the Court of Common Pleas the trust company insisted that all exempt shares (including the shares of the Philadelphia National Bank) should be deducted from the gross assets in full. This would exempt their full value rather than a proportion of their taxed value as ascertained by the use of the proportional method above described. The further objection was made that the method of settlement adopted resulted in discrimination against exempt securities issued by the United States or other Federal instrumentalities and that these should have been deducted at their full value from the gross assets before any computation of the tax. The Common Pleas Court overruled these objections (without discussing the [fol. 117] treatment of the national bank shares), saying, with respect to United States bonds and like exempt securities, that as the tax was a tax upon shares, and not upon the assets of the trust company, those securities had not in fact been taxed. In affirming the judgment the Supreme

Court of Pennsylvania said that as the specifications of objections had not covered the point as to national bank shares and the court below had not discussed that matter it was not open in the appellate court. As respects United States bonds, and other Federal securities, it concurred in the view of the lower court.

First. The appellant insists that as merely a portion of the net assets of the corporation is taken as the basis or measure of the tax it cannot be upon the shares as shares. The appellee relies upon the statement of the Supreme Court of Pennsylvania that the levy is upon the shares and not upon assets. The appellant asks us to find to the contrary. We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the state, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect.[10]

It is clear that the tax is not measured by each shareholder's aliquot proportion of all the assets of the company. If amongst those assets are found shares of stock of Pennsylvania corporations which, or whose shares, have been declared exempt by the State, this exemption is effected in the [fol. 118] instant case by taking them wholly or partially out of the net assets which are the base for the tax. The appellant says this demonstrates that the tax is one upon assets. If the appellant is right the exaction operates as a discrimination against Government securities and other assets exempt under federal law. Missouri v. Gehner, 281 U. S. 313. If the tax is one truly upon that independent property evidenced by the ownership of a share of corporate stock its collection does not discriminate against United States securities.[11]

We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the

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[10]Senior v. Braden, 295 U. S. 422, 429.

[11]See note 8, supra.

theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession [fol. 119] from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities.

Second. It is indisputable that the shares of stock of the Philadelphia National Bank owned by the appellant were included in the base or measure of the tax. It is undenied that these shares had been taxed to the trust company, as permitted by R. S. 5219, and in accordance with the applicable statutes of Pennsylvania;[12] and it must be conceded that having once been taxed to their owner, the trust company, they may not again be made the base or measure of a tax to that company's stockholders. Bank of California v. Richardson, 248 U. S. 476. The trial court seems to have excluded them upon the theory that they were not within the intent of the taxing statute, which the court thought meant to exempt only shares of Pennsylvania corporations which had been taxed or relieved from tax by local law.

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[12]Act of July 15, 1897, P. L. 292, as amended by Act of April 25, 1929, P. L. 677.

This view the trial court appears to have abandoned in a later case,[13] where it was held that stock of a federal reserve bank was within the meaning of the Pennsylvania act and [fol. 120] entitled to exemption. This later decision was affirmed by the Supreme Court of Pennsylvania.[14]

We are told that the matter is not open here for the reason that it was not raised on appeal to the Dauphin County court, was not discussed by that court, and consequently the Supreme Court refused to consider it. Whether the point was in fact raised in the court below is itself a federal question, and we are bound to examine the record to resolve it.[15] It appears that in the specifications of objection filed in Dauphin County court complaint was made that whereas there should have been a flat deduction of all shares of corporations theretofore taxed or exempted from tax, shares of the Philadelphia National Bank were included in shares granted only a proportional deduction. It further appears that in accordance with Pennsylvania practice, after the trial of the cause to the court without a jury the appellant submitted requests for conclusions of law. Amongst these were requests 10 and 16, which referred specifically to the Philadelphia National Bank stock, and severally requested the court to find (a) that these shares having been once taxed under another act, to the trust company as owner, could not be taxed a second time, and (b) that the failure to deduct the full value of the shares from the net assets of the trust company operated to discriminate and impose a tax upon the shares of stock in violation of R. S. 5219, they having once been taxed under another statute. The court answered both these requests in writing, "Refused." The [fol. 121] refusal of the requests was made the subject of exceptions which quoted the requests and the answers of the court verbatim. The exceptions were overruled by the court and errors were assigned to the Supreme Court of Pennsylvania to the overruling of the exceptions applicable to the refusal of the requests in question, which were again quoted verbatim, with the answer of the court to the request and

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[13] Com. v. Provident Trust Co., 40 Dauphin County (Pa.), 146, 177.

[14] 319 Pa. 385, 180 Atl. 16.

[15] Carter v. Texas, 177 U. S. 442, 447; Ward v. Love County, 253 U. S. 17, 22.

the overruling of the corresponding exception. In addition to these assignments of error the appellant in the statement of questions involved, required by the rules of the Supreme Court of Pennsylvania to be made a part of the brief on appeal, amongst others set forth the following question: "Are assets consisting of national bank shares to be eliminated from consideration in determining the taxable value to which the rate of tax is to be applied by deducting their actual value from the value of the net assets? Answer of the court below No."

We think that notwithstanding the Dauphin County court, in its opinion, failed to discuss this matter, as the Supreme Court of Pennsylvania points out, the question was sharply presented to that court and decided by it, and that the rights of the appellant were specifically preserved and pressed at every stage of the proceeding. We find, therefore, that the question is here for decision. It might well be disposed of by reference to what has already been said with respect to bonds of the United States and like securities. The discrimination here disclosed is, however, more obvious than in the case of the other securities mentioned. The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them be- [fol. 122] cause to include them in the base would be in effect to tax them a second time. The shares of the Philadelphia National Bank had also been taxed pursuant to R. S. 5219, and if they were to be treated on an equal footing with shares of domestic corporations the State was bound to afford them a similar exemption from a second exaction.

Third. The appellant argues that if, as declared by the Supreme Court of Pennsylvania, the tax is one upon shares as such, it cannot be laid or collected by the Commonwealth in respect of 166 shares of stock of the appellant which by confession are owned by individuals citizens and residents of states other than Pennsylvania, for the reason that such shares have no taxable situs in Pennsylvania. In view of the grounds of our decision we find it unnecessary to pass upon this contention.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[November 11, 1935]

Mr. Justice CARDOZO, dissenting:

I think the judgment under review is right in so far as it permits the inclusion of government bonds as factors of value in the assessment of the tax, and wrong only in so far as it violates a provision of Sec. 5219 of the United States Revised Statutes by the inclusion of shares in the Philadelphia National Bank.

The tax in controversy is not laid upon the capital of the trust company. It is laid upon the shares, payment being made in the first instance by the corporation as the agent of the shareholders with a remedy over for moneys so ad- [fol. 123] vanced. Home Savings Bank v. Des Moines, 205 U. S. 503, 518; Commonwealth v. Merchants' & Manufacturers' National Bank, 168 Pa. 309; affirmed 167 U. S. 461; Commonwealth v. Mortgage Trust Co., 227 Pa. 163; Commonwealth v. Union Trust Co. of Pittsburgh, 237 Pa. 353; Northern Trust Co. v. McCoach, 215 Fed. 991; cf. National Bank v. Commonwealth, 9 Wall. 353, 362; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 444, 445. The tax being laid upon the shares, and not upon the capital, the Constitution does not make it necessary in the assessment of the tax to reduce the value of the shares to the extent that bonds of the national government are included in the capital. This is settled law. Van Allen v. The Assessors, 3 Wall. 573; Cleveland Trust Co. v. Lander, 184 U. S. 111; Des Moines Bank v. Fairweather, 263 U. S. 103, 112; Educational Films Corp. v. Ward, 282 U. S. 379, 390.

The argument for the appellant is that the tax might have been lawful if the shares had been valued without any deductions growing out of the nature of the capital, but that the moment a deduction was allowed in respect of any class, there was an unlawful discrimination against government securities unless the deduction was enlarged and made applicable to them. The attack is thus confined to amendments of the act which were placed upon the statute books in three years (1923, 1927, 1929), for there was no deduction of any kind under the act as first adopted in 1907. These amendments provide that the assessment shall be reduced by deducting therefrom (1) such part of the assets of the trust company as is invested in shares of other corporations taxed by the Commonwealth of Pennsylvania upon capital or shares (1923, July 11, P. L. 1071,

[fol. 124] 1072, reenacted by 1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675), and (2) such part as is invested in the shares of other corporations relieved by the Commonwealth from a capital tax or a tax on shares (1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675). The purpose of the first deduction is to avoid double taxation or something akin thereto. Cf. Commonwealth v. Fall Brook Coal Co., 156 Pa. 488, 495; Commonwealth v. Lehigh Coal & Navigation Co., 162 Pa. 603, 609. The purpose of the second is to promote the policy of the Commonwealth whereby particular kinds of business (i. e., the business of manufacturing corporations, laundering corporations and corporations for the processing and curing of meats) are relieved from the payment of taxes imposed on other corporations to the extent that the business so favored is carried on in Pennsylvania.* Dupuy v. Johns, 261 Pa. 40, 46.

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* The following is the text of the statute which defines the corporations entitled to such relief:

"And provided further, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, or for manufacturing purposes, which is invested in and actually and exclusively employed in, carrying on laundering, the processing and curing of meats, their products and by-products, or manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain; but every corporation, limited partnership, or joint-stock association organized for the purpose of laundering, or processing and curing meats, their products and by-products, or manufacturing, shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the laundering or manufacturing business, or the business of processing and curing meats, their products and by-products, in addition to the local taxes assessed upon its property in the district where located; it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the laun-

[fol. 125] At the time of the assessment the appellant was the owner of shares in corporations that paid a tax upon their capital to the Commonwealth of Pennsylvania. Purdon's Pennsylvania Statutes, Title 72, § 1871. These shares will be described for convenience as investments in class number 1. Except for certain shares in the Philadelphia National Bank, which will be separately considered, the assets did not include an interest in corporations that paid a tax upon their shares as distinguished from one upon their capital. The appellant was also the owner, or so it will be assumed, of shares of stock in manufacturing corporations that were relieved from any tax. These shares will be described for convenience as investments in class number 2. The holding now is that the deduction of the shares of either of these classes is an act of discrimination forbidden by the national constitution unless investments in obligations issued by the national government are accorded the same favor.

I read the cases otherwise. The statute was not passed as an act of "unfriendly discrimination" (Adams v. Nashville, 95 U. S. 19; Mercantile Bank v. New York, 121 U. S. 138, 161, Aberdeen Bank v. Chehalis County, supra, at p. 461) against the national securities, nor was it passed in aid of classes of investments with which the national securities are in substantial competition. In the absence of one or other of these motives or results the prejudice, if any, is too remote to be forbidden. There is no room in [fol. 126] the solution of problems of this order for doctrinaire definitions, heedless of practical results. Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 524. "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper,

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dering or manufacturing plant and business, or the plant and business used in the processing and curing of meats, their products and by-products: Provided, further, In case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania." Purdon's Penn. Statutes, Title 72, § 1892.

unavoidably has some effect upon the other." Metcalf & Eddy v. Mitchell supra, at p. 523. A sterile formalism would quickly lead to an impasse, the activities of the states checked because of an indirect effect upon the agencies of the federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way if government is to go on at all. Educational Films Corp. v. Ward, supra, at p. 390 and cases there cited; Pacific Co. v. Johnson, 285, U. S. 480, 489; Trinityfarm Co. v. Grosjean, 291 U. S. 466; Willcuts v. Bunn, 282 U. S. 216, 225, 226; Helvering v. Powers, 293 U. S. 214, 225.

"Unfriendly discrimination" might be inferred if securities of every kind were excluded from the reckoning with the single exception of the obligations of the national government. That would be an extreme case, the conclusion hardly doubtful. Even though hostility were not so pointed as in the case supposed, there might still be an invidious distinction if securities in substantial competition with evidences of indebtedness issued by the national government had been given a preferred position. Nothing of the kind appears. "For reason of public policy and not as an unfriendly discrimination" (Aberdeen Bank v. Chehalis County, supra at p. 461), the value of a share in a trust [fol. 127] company is to be ascertained by excluding from the assets the shares in other corporations that are liable to the state for a tax upon their capital. Let it be assumed, for illustration, that a trust company is the owner of shares of stock in a department store doing business in Philadelphia. Under the statutes of Pennsylvania a business of that kind pays a tax upon its capital. A trust company does not. If it did, a hardship akin to that of double taxation would result if its interest in the department store were made use of to magnify its burden. But the process of taxation does not end at that point. By the plan of the statute the assessor passes over the trust company and lays the tax upon the shareholders. The same considerations of fair dealing and equality are then applicable to them. So at least the legislature of Pennsylvania might not unreasonably believe. Never before has it been held that out of deference or favor toward the securities of government a state is disabled from framing its system of taxation along lines of equity and justice. Hepburn v. The School Directors, 23 Wall. 480, 485.

What is true of investments in class number 1 is true also of investments in class number 2. "For reasons of public policy and not as an unfriendly discrimination" (Aberdeen Bank v. Chehalis County, supra), corporations organized for laundering, for the processing and curing of meats, and for manufacturing within the state have been relieved by Pennsylvania from liability for a tax upon their capital. The motive dictating that exemption is the desire to induce capital to come or stay within the state when employed in forms of enterprise believed to be important for the good of the community. Dupuy v. Johns, supra; [fol. 128] Commonwealth v. Barnes Bros. Co., 5 Dauph. 75, 77; cf. New York State v. Roberts, 171 U. S. 658, 665, 666. In promotion of the same policy the shares of corporations thus relieved from liability for a tax are excluded from the reckoning when shareholders in trust companies are taxed upon the value of their holdings. The reckoning does not exclude the bonds or notes or other evidence of indebtedness of corporations of any kind, foreign or domestic. It does not exclude the shares of any corporation not engaged in the enumerated forms of business, except in so far as such other corporations have already paid a tax upon their capital or shares. It does not exclude the shares of manufacturing corporations except to the extent of the capital employed in Pennsylvania. The deduction is limited in range and beneficient in aim.

The situation, then, is this. Vast classes of securities—bonds and notes of every kind, as well as shares of stock in many and varied enterprises—are in the same position for the purpose of the tax in suit as government bonds and notes. The few investments that occupy a different position are not comparable in kind or in attractiveness to the obligations of the government and do not substantially compete with them. To hold that there was discrimination here in any forbidden sense is to hold that bonds and notes of the United States must be deducted from the value of the shares if there is a deduction of any form of investment, no matter how minute in amount or alien in quality. Assume, for illustration, an exemption of the shares of corporations engaged in the manufacture of books or in the sale of works of art, an exemption accorded in furtherance [fol. 129] of a policy to foster art and letters. If the prevailing opinion stands, the policy in such a case must be

abandoned or the federal bonds included. Assume again that laundering corporations only had been relieved by Pennsylvania from liability for a tax upon their capital. Laundering corporations, as we have seen, were actually relieved, but manufacturing corporations also. The prevailing opinion, if it stands, would bring us to a holding that laundering corporations could not be favored without hostility and peril to the treasury at Washington. This is to lose sight of the essence of discriminatory statutes and to stick in the bark of a hard and narrow verbalism.

From such incongruities and excesses the avenue of escape is clear. It is to be found in the acceptance of the test put forward in this opinion. The discrimination, as has been said, must be so marked as to justify the inference that it was unfriendly in design or at the very least it must favor forms of investment that are in substantial competition with government securities. A helpful analogy is found in the taxation of national banks. By R. S. § 5219; 12 U. S. C. § 548, the several states may tax the shares of national banks, but "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." There are many cases in this court expounding that enactment. Hepburn v. The School Directors, supra, was a case where a statute of a state had given exemption from taxation to "all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real [fol. 130] estate." The court assumed that the exempt investments might be ranked as moneyed capital. The tax upon the bank shares was none the less upheld. The exemption was partial only. "It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it." Id. at p. 485. There was no token of a hostile purpose. "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt," Ibid. Adams v. Nashville, 95 U. S. 19, was a case where a municipal ordinance gave exemption from taxation to the municipal bonds. Again the ruling was that this exemption of particular property did not affect the validity of the tax upon the shares. "The plain intention of that statute [R. S. § 5219] was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise

of their taxing power." Id. at p. 22. "It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so." Ibid. Mercantile Bank v. New York, 121 U. S. 138, was a case where exemption had been given to bonds of municipal corporations and also to deposits in savings banks. Again the protest of discrimination was unavailing to defeat the tax. After quoting from Hepburn v. The School Directors and Adams v. Nashville, the court went on to say (p. 161): "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national banks." The same note is sounded in Aberdeen Bank v. Chehalis County, supra. Even though the investments subjected to a lighter [fol. 131] tax are to be classed as moneyed capital, this is unavailing without more to condemn the classification as unlawful. Unless the favored moneyed capital is in substantial competition with the business of national banks, the preference is innocent in aim and harmless in result. At least, the harm, if any, is too remote and dubious to vitiate the tax. First National Bank v. Hartford, 273 U. S. 548, 552; Minnesota v. First National Bank, 273 U. S. 561, 568; Georgetown National Bank v. Anderson, 269 U. S. 341, 348; First National Bank v. Tax Commission, 289 U. S. 60, 65, 66; cf. Hibernia Savings Society v. San Francisco, 200 U. S. 310, 314, 315. The conclusion is even clearer where the investment may not properly be classified as moneyed capital at all.*

Two cases, National Life Insurance Co. v. United States, 277 U. S. 508, and Missouri ex rel. Missouri Insurance Co. v. Gehner 281 U. S. 313, much relied upon by the appellant, are far beside the mark.

The first of these cases brought up a controversy as to a tax laid by a state on the income of a life insurance company. The company was to be allowed (1) a deduction for tax exempt securities, and (2) an amount equal to 4% of its mean reserve fund, diminished, however, by the amount

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* For other and less direct analogies see: Cumberland Coal Co. v. Board of Revision, 284 U. S. 23, 28; Iowa-Des Moines Bank v. Bennett, 284 U. S. 239, 245; Rowley v. Chicago & N. W. R. Co., 293 U. S. 102, 111.

of the first allowance, the interest on government securities exempt under the federal law. The court held that the effect of the second allowance was to cancel the exemption conceded by the first.

[fol. 132] The second of the two cases was one where in the view of a majority of the court a tax had been laid directly on the capital assets of the taxpayer and so on the government bonds included in the assets. It was not a case like this where the shares and not the capital were subjected to the burden.

I am unable for these reasons to discover an unlawful discrimination though the tax be assessed in accordance with the statute.

Assuming such a discrimination, I do not understand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it.

The Acts of 1923, 1927 and 1929 prescribing the deductions, were amendatory statutes, separable, even though invalid, from the acts thereby amended. Eberle v. Michigan, 232 U. S. 700, 705; Davis v. Wallace, 257 U. S. 478, 484, 485; Truax v. Corrigan, 257 U. S. 312, 342.

If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. Iowa-Des Moines Bank v. Bennett, 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of [fol. 133] lessened. The choice between these curative measures must be made by the state court.

For reasons stated in Bank of California v. Richardson, 248 U. S. 476, the assessment is excessive to the extent that it includes shares of stock of the Philadelphia National Bank belonging to the Trust Company. These shares having been taxed to the Trust Company as owner could not properly be taxed again to a shareholder of the owner. Bank of California v. Richardson, supra; R. S. § 5219.

Other questions are in the case, but they are not decided in the prevailing opinion, and will not be considered here.

The judgment should be modified by directing the deduction from the assessment of the value of the appellant's shares in the Philadelphia National Bank, and as modified affirmed.

Mr. Justice Brandeis and Mr. Justice Stone join in this opinion.

[fol. 134] MANDATE OF THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Middle District, Greeting:

Whereas lately in the Supreme Court of the State of Pennsylvania, Middle District, before you, or some of you, in a cause between Schuylkill Trust Company, Appellant, and the Commonwealth of Pennsylvania, Appellee, No. 19 May Term 1934, wherein the opinion and judgment of the said Supreme Court overruling the assignments of error and affirming the judgment of the Court of Common Pleas of Dauphin County, was duly entered in said cause on the 30th day of June, A. D. 1934;

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-five the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs; and that the said appellant, Schuylkill [fol. 135] Trust Company, recover against the said appellee Three Hundred and Forty-four Dollars for its costs herein expended and have execution therefor.

And it is Further Ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

November 11, 1935.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

IN SUPREME COURT OF PENNSYLVANIA

REMITTITUR

MIDDLE DISTRICT OF PENNSYLVANIA,

The Commonwealth of Pennsylvania, sct:

To the Judges of the Court of Common Pleas for the County of Dauphin, Greeting:

Whereas, By virtue of our writ of certiorari from our Supreme Court of Pennsylvania in and for the Middle District, returnable in the said Court on the 21st Monday of the year of our Lord one thousand nine hundred and thirty-four, a Record was brought into the same Court of a Judgment rendered against Schuylkill Trust Company Appellant, at the suit of Commonwealth of Pennsylvania Appellee.

And it was so proceeded in our Supreme Court that the said judgment was affirmed and on appeal to the Supreme [fol. 136] Court of the United States, the same was reversed with costs, etc., as per mandate of said Supreme Court of the United States attached hereto and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of Assembly in such cases made and provided,) ordered by the said Supreme Court to be remitted to the Court of Common Pleas for the County of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain:

Wherefore We Remit You the Record of the Judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as afoesaid.

Witness, the Hon. John W. Kephart, Chief Justice of our Supreme Court at Harrisburg, the 28th day of January in the year of our Lord one thousand nine hundred and thirty-six.

Homer Hummel Strickler, Deputy Prothonotary.

IN COURT OF COMMON PLEAS

PETITION FOR RULE TO SHOW CAUSE

To the Honorable the Judges of said Court:

The Commonwealth of Pennsylvania respectfully represents:

That in the case of Schuylkill Trust Company, Appellant v. The Commonwealth of Pennsylvania, to the above num- [fol. 137] ber and term, the Supreme Court of the United States issued the following mandate:

"The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

That upon the receipt of the above mandate by the Supreme Court of Pennsylvania, the prothonotary of said court remanded the cause to the Court of Common Pleas of Dauphin County for further proceedings not inconsistent with the opinion of the United States Supreme Court in accordance with the above mandate.

Wherefore, the Commonwealth of Pennsylvania respectfully prays:

1. That your Honorable Court should revise its original judgment in this case by eliminating all deductions originally allowed the Schuylkill Trust Company in pursuance to the Act of June 13, 1907, P. L. 640, as amended by the Act of July 11, 1923, P. L. 1071, as amended by the Act of May 7, 1927, P. L. 853, as amended by the Act of April 9, 1929, P. L. 343, and enter judgment in favor of the Commonwealth of Pennsylvania and against the Schuylkill Trust Company in conformity with the decision of the United States Supreme Court in the above case, in the amount of $2,334.57 according to the following formula and pursuant to the Act of June 13, 1907, P. L. 640:

Actual value of capital stock paid in, surplus and undivided profits x 5 mills = 466,914 x 5 mills equals $2,334.57.

[fol. 138] 2. That a rule be issued on the Schuylkill Trust Company to show cause why the judgment in the above entitled case should not be so modified.

Manuel Kraus, Deputy Attorney General for the Commonwealth of Pennsylvania.

And now to wit, this 11th day of February, 1936, the above petition having been presented by Manuel Kraus, Deputy Attorney General for the Commonwealth of Pennsylvania, a rule is issued on the Schuylkill Trust Company to show cause why the judgment should not be entered in accordance with the above petition, returnable in 15 days.

By the Court.

Wm. M. Hargest, P. J.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

DEMURRER

To the Honorable the Judges of said Court:

The Respondent, Schuylkill Trust Company, by its Attorney, John Robert Jones, by protestation, not confessing or acknowledging all, or any, of the matters or things, in the said Petition contained to be true, in such manner and [fol. 139] form as the same in said Petition are set forth and alleged, demurs to the whole of the said Petition, and for the cause of demurrer shows:

1. That, upon the face of the Petition, as against this demurrant, the petitioner is not entitled to the relief prayed for.

2. That upon the face of the Petition it is shown that the Pennsylvania statute, the Act of June 13, 1907, Pamphlet Laws 640, was not the law of Pennsylvania in the calendar year ending December 31, 1930.

3. That upon the face of the Petition it is shown that the statute of the State of Pennsylvania imposing a tax in the calendar year ending December 31, 1930 upon trust companies or upon the owners of shares of stock issued by trust companies was the Act of April 25, 1929, Pamphlet Laws 673, and that upon an appeal to this court from the settlement of tax for the said tax and calendar year made by the Department of Revenue and approved by the Department of the Auditor General of the Commonwealth under authority of the said statute was the judgment of this court entered.

4. That the record of this case shows that a tax settlement was made against the demurrant, Schuylkill Trust

Company, for the tax and calendar year ending December 31, 1930 by the Department of Revenue and approved by the Department of the Auditor General of the Commonwealth under authority of the Pennsylvania statute, the Act of April 25, 1929, Pamphlet Laws 673, that a Petition for Resettlement filed under the provisions of Section 1102 [fol. 140] of Article XI of the Fiscal Code, the Pennsylvania statute, the Act of April 9, 1929, Pamphlet Laws 343, was refused, that upon Petition for Review filed with the Board of Finance and Revenue of the Commonwealth a resettlement of such tax was made by the said Board under authority of the said Act of April 25, 1929, Pamphlet Laws 673, and Section 1103 of Article XI of the Fiscal Code, the Pennsylvania statute, the Act of April 9, 1929, Pamphlet Laws 343, that it was under authority of the said statute, the Act of April 25, 1929, Pamphlet Laws 673, that this Court in the exercise of appellate jurisdiction conferred upon it by Section 1104 of Article XI of the Fiscal Code, the Pennsylvania statute, the Act of April 9, 1929, Pamphlet Laws 343, an appeal having been taken by the demurrant to this court from the decision of the said Board of Finance and Revenue, entered its judgment affirming the tax resettlement so made, that it was under authority of the said Act of April 25, 1929, Pamphlet Laws 673, and said Section 1104 of Article XI of the said Fiscal Code, the Pennsylvania statute, the Act of April 9, 1929, Pamphlet Laws 343, that the Supreme Court of Pennsylvania in the exercise of appellate jurisdiction affirmed the judgment of this court and that it was the said State statute, the Act of April 25, 1929, Pamphlet Laws 673, as it was construed and applied to the demurrant in the tax resettlement made against it and the judgments entered by this court and the State Supreme Court hereinbefore recited which the Supreme Court of the United States, the court of final jurisdiction, held to be discriminatory, in violation of the 14th Amendment to the Constitution of the United States; hence it is that this court is without any statutory or constitu- [fol. 141] tional power to revise its judgment so entered as aforesaid under authority of the said Act of April 25, 1929, Pamphlet Laws 673, by striking off such judgment and substituting in lieu of it a judgment for the tax claimed to have been imposed upon the demurrant in the tax and calendar year ending December 31, 1930, as a member of a

separate class of taxables, by another state statute under the authority of which no tax was imposed in the said tax and calendar year upon any corporation or upon the owners of the shares issued by any corporation.

5. That this court is without authority to grant the prayer of the Petition to make a settlement of tax against the demurrant for the tax and calendar year ending December 31, 1930 under the alleged authority of a State statute, the Act of June 13, 1907, Pamphlet Laws 640, and to embody a tax settlement so made by it in a judgment which is to be substituted for a judgment of this court which had been entered upon an appeal to it from a tax resettlement made by the taxing officials of the Commonwealth as recited in paragraph "4", supra, under authority of the State statute, the Act of April 25, 1929, Pamphlet Laws 673.

6. That if the State statute, the Act of June 13, 1907, Pamphlet Laws 640, had been the law of the Commonwealth of Pennsylvania in the tax and calendar year ending December 31, 1930 and if this court did have the power to enter a judgment as prayed for in the Petition upon which the rule was issued to impose a tax for the tax and calendar year ending December 31, 1930 under the authority of the said [fol. 142] Act of June 13, 1907, Pamphlet Laws 640, and to substitute such judgment in lieu of the judgment which this court entered, upon appeal, for the said tax and calendar year under authority of the State statute, the Act of April 25, 1929, Pamphlet Laws 673, nevertheless the entry of such judgment as prayed for in the Petition violates the provisions of the recited Act of June 13, 1907, Pamphlet Laws 640, for the reason that the judgment prayed for in the Petition does not allow the deductions to which the demurrant would be entitled under the provisions of the said Act of 1907.

7. That if the said State statute, the Act of June 13, 1907, Pamphlet Laws 640, had been the law of the Commonwealth of Pennsylvania in the tax and calendar year ending December 31, 1930, an entry of judgment by this court as prayed for in the said Petition violates the provisions of the said Act of June 13, 1907, Pamphlet Laws 640, for under the express provisions of the said statute the sole power and

duty to ascertain and fix the taxable value to which the millage rate of tax is to be applied in order to determine the tax liability, grant the deductions allowed by the said statute, assess the tax imposed and embody the same in a tax settlement is that of the Auditor General of the Commonwealth of Pennsylvania (or the Department of Revenue if the State statute, the Fiscal Code, the Act of April 9, 1929, Pamphlet Laws 343, now be held to amend the said Act of June 13, 1907, Pamphlet Laws 640) upon a report required to be made to him at the time specified in said statute by the trust companies which constitute the members of the class of taxables created by such statute; from which [fol. 143] settlement any trust company has the right of appeal to this court under the provisions of the Act of March 30, 1811, 5 Smith's Laws 228, and its amendments.

8. That the entry of a judgment as prayed for in the Petition upon which the rule upon the demurrant was issued imposing a tax for the tax and calendar year ending December 31, 1930 under the alleged authority of a State statute, the Act of June 13, 1907, Pamphlet Laws 640, is in violation of Section 1 of Article IX of the Constitution of Pennsylvania which provides:

"All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; * * *"

9. That the entry of a judgment as prayed for in the Petition upon which the rule upon the demurrant was issued imposing a tax for the tax and calendar year ending December 31, 1930 under the alleged authority of a State statute, the Act of June 13, 1907, Pamphlet Laws 640, is in violation of the decision of the Supreme Court of the United States and the judgment directed by such court to be entered in the above entitled appeal.

10. That the entry of a judgment as prayed for in the Petition upon which the rule upon the demurrant was issued imposing a tax for the tax and calendar year ending December 31, 1930 under the alleged authority of a State statute, the Act of June 13, 1907, Pamphlet Laws 640, violates Clause 2 of Section 8 of Article I of the Constitution of [fol. 144] the United States which gives the Congress of the

United States the power to borrow money on the credit of the United States, Section 3701 Revised Statutes of the United States, United States Code, Title 31, Section 742, Section 5219 Revised Statutes of the United States, United States Code, Title 12, Section 548, the Acts of Congress recited in the Assignments of Error filed with the Supreme Court of the United States in the above entitled appeal to such court and the decisions of the Supreme Court of the United States in the cases of Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass., 279 U. S. 620 1929), Bank of California v. Richardson, 248 U. S. 476 (1919) and Corry v. Baltimore, 196 U. S. 466 (1905).

11. That the entry of a judgment as prayed for in the Petition upon which the rule upon the demurrant was issued imposing a tax for the tax and calendar year ending December 31, 1930 under the alleged authority of a State statute, the Act of June 13, 1907, Pamphlet Laws 640, violates Section 1 of the 14th Amendment to the Constitution of the United States by depriving the demurrant and the owners, both residents and non-residents of the State of Pennsylvania, of the shares of stock issued by the demurrant of its and their property without due process of law and by denying to the demurrant and the owners, both residents and non-residents of the State of Pennsylvania, of the shares of stock issued by the demurrant the equal protection of the laws.

Wherefore, and for other good causes of demurrer appearing upon the face of the Petition, this demurrant demurs [fol. 145] thereto and prays the judgment of your Honorable Court whether it shall be required to make any answer to the said Petition, and it further prays to be hence dismissed with its reasonable costs in this behalf sustained.

John Robert Jones, Attorney for Demurrant.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

JUDGMENT—April 20, 1936

And now, April 20, 1936, for the reasons given in an opinion hereafter to be filed in this case and in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No.

162 Commonwealth Docket, 1933, judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1801.03, less, however, the allowance of costs to the said Schuylkill Trust Company of $344 fixed by the mandate of the Supreme Court of the United States, unless exceptions be filed within the time limited by law.

Wm. M. Hargest, P. J.

[fol. 146] In Court of Common Pleas of Dauphin County

Opinion Upon Remittitur

By the Court:

This case involves the settlement by the accounting officers of the tax on shares of the appellant company for the year ending December 31, 1930. Judgment was entered by this court against the defendant (38 Dauph. 22), which was affirmed by the Supreme Court of Pennsylvania (315 Pa. 429), but reversed by the Supreme Court of the United States November 11, 1935, 296 U. S. 113. The order of the Supreme Court is as follows: "The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The questions involved were: 1. What deduction should be made because of the ownership by the defendant of the stock of the Philadelphia National Bank and of United States securities? 2. Is the defendant entitled to have deducted from the settlement the taxable value of all its shares which are held by persons or corporations resident and domiciled in other states of the United States?

In the judgment of this court and of the Supreme Court of Pennsylvania, a proportionate deduction was allowed for the ownership by the appellant in the shares of stock of the Philadelphia National Bank, and no deduction was allowed for the ownership of United States securities. The [fol. 147] Supreme Court of the United States held that that conclusion amounted to a discrimination against the stock of the national bank and the United States securities, and that the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, amending the Act of June 13, 1907, P. L. 640, were unconstitutional as "construed and applied by the Department and the courts" in the settlement in this case.

In order to ascertain the precise contention of the parties as to what judgment should be entered under the mandate of the United States Supreme Court, a petition was presented to this court by the Commonwealth asking that judgment be entered under the Act of 1907 without allowing any deductions. A rule was granted thereon. The defendant, however, expended considerable energy in demurring to the rule and in preparation of a brief in sustaining the demurrer, raising the question that the court had no jurisdiction to enter judgment for a tax upon this petition and rule. The case, however, was argued on the merits, and inasmuch as we have the contentions of the parties now submitted to us it is not necessary to determine the matter upon the petition and rule.

The contention of the defendant is that judgment should be entered in favor of the defendant, because if the amending acts are unconstitutional the Act of 1907 itself is also unconstitutional.

At the time this case was re-argued, the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket 1933, was also argued. It involves [fol. 148] all of the questions involved in the instant case. Counsel for the defendant in that case contended that neither the position of the Commonwealth to enter judgment under the Act of 1907 without any deductions, nor the position of the defendant to enter judgment for it because the Act of 1907 itself is unconstitutional, was sound, but that the decision of the Supreme Court of the United States only held the amending acts "as construed and applied" in the instant case to be unconstitutional, and that the amending acts could be so construed and applied as to sustain all of them.

An examination of the record in the Supreme Court of the United States shows that no assignment of error attacks the constitutionality of these amending acts without reference to their application. Every assignment of error attacks the acts as "construed and applied" in the settlement in this case. The Supreme Court of the United States also stated the contention as follows: "The appellant's contention is that the act as so construed and applied by the Department and the courts discriminates against United States Government bonds, bonds of Federal instrumentalities, and national bank stocks included in the appellant's assets."

We are bound to place such a construction upon a statute as will sustain its constitutionality, if it is susceptible of such construction. We do not regard the mandate of the Supreme Court of the United States as definitely determining that these amending acts are unconstitutional and worthless as so much waste paper. We are of opinion that the [fol. 149] way is still open to the Pennsylvania courts to limit their application so that they will be free from any discrimination against United States securities or the shares of national banks.

In the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket 1933, filed this day, we have demonstrated that such a limitation can be applied to the amending acts so as to sustain them. Our conclusion is that if a full deduction is made for the investment in the shares of national banks and a full deduction is made for the investment of the shares of United States securities, when it is shown that those securities have been purchased out of capital, surplus or undivided profits, and a proportionate deduction is made for United States securities when it is not shown that they have been purchased out of capital, surplus and undivided profits, there would be no unconstitutional application of these amending statutes. There is no evidence in the instant case that any of the United States securities were purchased out of capital, surplus or undivided profits.

In the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385, we determined that, in ascertaining the taxable value of the shares of trust companies, the following formula should be applied:

1. The full market value of all securities must be deducted, if they be wholly investments of capital, surplus and undivided profits. Otherwise a proportionate deduction is to be made.

2. Where a proportionate deduction is to be made it should be according to the following formula:

[fol. 150] (a) The numerator to consist of the capital, surplus and undivided profits determined by the book values, less the book value of those shares, if any, for which a full deduction has been made.

(b) The denominator to consist of the book value of permanent investments, less the book value of those shares, if any, for which the full deduction has been made.

(c) The multiplicand to be the book value of the shares which are apportioned.

(d) The result thus obtained to be increased or decreased by the amount of appreciation or depreciation of the shares which are apportioned.

We see no reason for departing from this formula in the instant case. It must be amplified by allowing a full deduction for national bank shares.

2. The defendant contends that the taxable value of all its shares which are held by persons or corporations resident or domiciled in other states of the United States should be deducted in arriving at the settlement.

Inasmuch as we have decided in the case of Commonwealth v. Provident Trust Company, supra, and in this case that it is not entitled to such deduction, the tax being a tax on shares, and both of those cases having been affirmed by the Supreme Court of Pennsylvania, (and while the question was raised in the Supreme Court of the United States it was not passed upon), we are still bound to fol- [fol. 151] low the decision of the Supreme Court of Pennsylvania and we, therefore, conclude that the defendant is not entitled to such deductions.

Conclusions of Law

1. In the enactment of the Acts of June 13, 1907, P. L. 640, July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, the legislature intended to impose a tax upon the shares of stock of trust companies by adding together the value of the capital, surplus and undivided profits and deducting therefrom the full value of shares of stock of national banks and of Federal reserve banks, and so much thereof as is invested in the shares of stock of other corporations liable to or relieved from a tax on capital stock or shares or in securities issued by the United States Government, its agencies, instrumentalities or dependencies.

2. The acts above referred to must be construed so as to provide that, in computing the taxable value of the shares of stock of a trust company, the deductions expressly provided for by said acts should be made, and that such other deductions should be made as are necessary to avoid dis-

crimination in favor of the classes of securities specified therein and against the shares of stock of national banks or federal reserve banks or against securities issued by the United States Government, its agencies, instrumentalities or dependencies, in order that the intention of the legislature may be carried into effect, and conflict with the statutes and Constitution of the United States may be avoided.

[fol. 152] 3. The acts above referred to, as they have been construed and applied by the taxing officers of the Commonwealth in the settlement of the tax against the appellant, are unconstitutional and void, but those statutes, when so construed and applied as to avoid any discrimination against securities of the United States, its agencies, instrumentalities and dependencies and of national banks, are constitutional.

4. In computing the taxable value of the shares of the appellant, the full reported market value of the shares of stock of the Philadelphia National Bank owned by appellant should be deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets.

5. By reason of the ownership of the appellant of shares of stock of other corporations which are liable to pay a tax on their capital stock or shares, and of securities issued by the United States Government or its agencies, instrumentalities or dependencies, which securities have not been shown to consist entirely of investments of capital, surplus and undivided profits of the appellant, it is entitled, in computing the taxable value of its shares, to have deducted from its capital surplus and undivided profits, as the same are determined from the market value of its assets, a proportion of the value of all such securities, as determined by the following formula:

(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of [fol. 153] the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made: (c) such fraction to be multiplied by the book value of the securities which are to be apportioned

(d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned.

6. The situs of the shares of stock of a trust company for the purpose of taxation is the domicile of the company.

7. The appellant is not entitled to have deducted in the settlement of the taxable value of its shares those shares which are held by persons or corporations resident or domiciled outside of the State of Pennsylvania.

8. Judgment must be entered in favor of the Commonwealth and against the defendant.

From what we have said in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket, 1933, we conclude that for the purpose of taxation the following is a correct

[fol. 154] Statement

Capital Stock, Surplus and Undivided Profits (book value)		$441,667
Appreciation		25,247
Capital, Surplus and Undivided Profits (market value)		$466,914
Less:		
A. Full deduction for shares of National Banks	$20,202	
B. Proportionate deduction for United States Securities and exempt shares of stock $\frac{446,712}{3,735,680} \times 286,944 =$	34,318	54,520
Taxable Value of Capital Stock		$412,394
Tax on same at 5 mills	$2,061.97	
Amount paid on account	570.43	
Balance due the Commonwealth	1,491.54	
Interest from April 8, 1933	223.73	
Total	1,715.27	

Statement—Continued

Attorney General's Commission of 5%	85.76
Total	$1,801.03
Less the costs allowed to the appellant in the mandate of the Supreme Court of the United States	344.00
	$1,457.03

[fol. 155] For the reasons given in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company No. 162 Commonwealth Docket, 1933, filed herewith, we directed judgment to be entered as above indicated April 20, 1936.

Wm. M. Hargest, P. J.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

No. 162, Commonwealth Docket, 1933

COMMONWEALTH OF PENNSYLVANIA

v.

GIRARD TRUST COMPANY

OPINION

By the COURT:

This case comes before us upon an appeal from the resettlement by the accounting officers of a tax on shares, in the sum of $100,838.58, made December 14, 1932 for the tax year 1929. On October 10, 1930, a settlement was made against the defendant for $96,942.75, on account of which the appellant paid into the State Treasury November 28, 1930, $70,000.

This case was heard by the court November 1, 1933. Its disposition has been delayed because it involved the same questions which were raised in the case of Commonwealth v. Provident Trust Company, in which we filed an opinion (40 Dauph. 146), and a subsequent opinion on exceptions (41 Dauph. 1), which was affirmed by the Supreme Court of Pennsylvania, (319 Pa. 385), and also because it involved [fol. 156] some of the same questions which were involved

in the case of Commonwealth v. Schuylkill Trust Company, 38 Dauph. 22, 315 Pa. 429, 173 A. 319, which was decided by the Supreme Court of the United States November 11, 1935, 296 U. S. 113.

A stipulation was filed submitting the case to trial by the court without the intervention of a jury, pursuant to the Act of April 22, 1874, P. L. 109.

Appeals to this court from tax settlements are heard de novo, Art. XI, Sec. 1104, of the "Fiscal Code" of April 9, 1929, P. L. 343, 72 P. S. 1104.

We have found the facts in answer to requests of the Commonwealth and the defendant, and it is not necessary to repeat them here.

Primarily, four important questions are involved in this case: 1. What deduction, if any, should be made because of the ownership by defendant of securities of the United States or of Federal agencies and shares of stock of national banks? 2. Should a proportionate deduction be made by reason of the ownership of shares of stock of other corporations, and, if so, how shall the deduction be computed? 3. Are the shares of stock of the defendant company which are held by non-resident individuals or by foreign corporations taxable? 4. Are the shares of stock of defendant company held by charitable, religious, educational, and non-profit corporations taxable?

1. In Schuylkill Trust Company v. Pennsylvania, 296 U. S. 113, the Supreme Court of the United States had [fol. 157] before it the Act of June 13, 1907, P. L. 640, as amended by the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673. The settlement in that case was arrived at by allowing a proportionate deduction of the value of the shares of the Philadelphia National Bank owned by the Trust Company, but allowing no deduction whatever on account of United States securities. The company contended that, in arriving at the taxable value of its shares, both of these assets should have been deducted at their full value because the tax is a tax upon property and not upon shares; that the United States securities were therefore not subject to tax, and the national banks having already been taxed under the manner provided by R. S. 5219 and Pennsylvania Statute of July 15, 1897, P. L. 292, it followed that under the statute requiring the deduction of the shares of other corporations

liable to, or relieved from, taxation, the failure to deduct United States securities and shares of national banks resulted in discrimination against the latter.

The majority of the Supreme Court of the United States held that the statute, "as construed and applied" in the tax settlement, discriminated against the United States securities and the shares of national banks, and was, as thus applied, invalid. The order was: "The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion." The minority of the Supreme Court of the United States held that the tax was a tax on shares and therefore no deduction of United States securities was required; that there was no unfriendly discrimination against United States securities in [fol. 158] the application of the act, but that the shares of stock of the national bank owned by the appellant, having already been taxed, should not be included in the valuation of the shares of the Trust Company. The minority would have modified the judgment by directing a deduction from the assessment of the value of the Trust Company shares as represented by the shares of the Philadelphia National Bank.

The important question before us is the proper construction of the mandate of the Supreme Court to proceed with the case in a way not inconsistent with its opinion.

The Schuylkill Trust Company case was again argued before us along with this case, and three contentions are before us. (a) The Schuylkill Trust Company insists that if these amending acts are unconstitutional the original Act of 1907, which contains the same discrimination, is also unconstitutional and that judgment must be entered for the defendant. (b) The Commonwealth contends that the second proviso of the Act of 1907 is, under the opinion of the Supreme Court of the United States, unconstitutional, but that the act stands without that proviso, and judgment should be entered under the Act of 1907 in favor of the Commonwealth without any deduction whatever. (c) This appellant, the Girard Trust Company, contends that under the opinion of the Supreme Court of the United States not only the Act of 1907, but the amendments of 1923, 1927 and 1929, may be so construed and applied as to make them all constitutional.

The act of 1907 provided for a tax upon the shares of trust companies. It required reports on or before the 20th [fol. 159] of June of each year and imposed upon the Auditor General the duty of assessing the shares by "adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing the amount by the number of shares." The act contains what we shall call the second proviso, permitting any trust company to pay the tax into the State Treasury on or before the 1st of March of each year. In that event the company first ascertained such tax without previous assessment by the Auditor General as follows:

"by adding together so much of the capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* (Italics ours) * * * and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

The Act of 1923 changed the time for making the report from June 20 to the last day of February and fixed the tax year as ending December 31, preceding, and extended the exemption, which was given under the Act of 1907, to those corporations which paid prior to March 1st, to all trust companies. It will be noted that the Act of 1923 made no other pertinent change in the Act of 1907 except to extend the exemption to corporations regardless of when the tax was paid. The Act of 1927 extended the exemption from taxation as indicated in the underscoring, to:

"So much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in the [fol. 160] shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, *or relieved from the payment of the capital stock tax* or tax on shares."

The Act of 1929 made no change in the substantive parts — the previous amendments. It simply adapted the Act of 1907 and the amendments to fit into the new structure of the State Government imposing the duties upon the Department of Revenue which were theretofore imposed upon the Auditor General.

What then is the situation under the opinion of the Supreme Court of the United States? That great Court is in the habit of saying what it means. If it intended to categorically declare the acts amending the Act of 1907 unconstitutional without qualification, would it have remanded the cause "for further proceedings not inconsistent with this opinion?" As the case was presented to the court it was not contended that these acts were unconstitutional as so much waste paper upon the statute books. The assignments of error in the Supreme Court of the United States attacking the statutes use the language "as construed and applied" or "in that it (the Commonwealth) construed and applied" the act unconstitutionally.

The first sentence of the opinion of the Supreme Court of the United States says:

"The appellant, a trust company, • • • challenges a statute of the state as construed and applied in the assessment of a tax for the year 1930, denominated a tax on shares. [fol. 161] • • • The appellant's contention is that the act as so construed and applied by the Department and the courts, discriminates against United States Government bonds, bonds of Federal instrumentalities and national bank stocks included in the Appellant's assets."

The contention of the Commonwealth, answering the argument of the appellant, was that the settlement was valid. We are therefore of opinion that the judgment of the Supreme Court of the United States in the Schuylkill Trust Company case does not preclude us from an inquiry as to whether the amending acts may be so construed and applied as to sustain their constitutionality.

It is trite to say that the court must, if possible, construe and apply a statute so as to sustain its constitutionality.

The opinion of the Supreme Court of the United States designates the Act of 1907 as a "true tax on shares and not a tax on assets of trust companies." But in copying the provisions of the statute in the margin it omitted that provision which permitted payment of the tax by deducting so much of the value "of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay a capital stock tax or tax on shares." The language of the opinion of the Supreme Court of the United States is, in part:

"It will be observed that by the amendments to the Act [fol. 162] of 1907 the measure of the tax is not in any sense the value of the shares as such, but a value reflected by *so much* of the net assets as is not represented by Pennsylvania corporations already taxed or exempt from tax."

If this extract from the opinion of the Supreme Court of the United States had stopped with the words "already taxed" it would be an accurate description of the Act of 1907 itself, insofar as it applied to those trust companies which paid the tax before March 1st; but the statute applied to all trust companies because it gave the right to all trust companies to pay the tax before March 1st, and thus there was the right in all trust companies to have a tax assessed only on "so much of the net assets as is not represented by shares of Pennsylvania corporations already taxed." The only things the amendments have done to the Act of 1907 are to extend the exemption so as to exclude not only the assets of the shares of corporations already taxed but also those which are "exempt from tax" and to extend that exemption to all corporations without regard to the time when the payment of the tax is made.

We cannot interpret the opinion of the Supreme Court of the United States in the Schuylkill Trust Company case as a positive mandate to us to enter judgment for the defendant in this case.

The question, therefore, is whether we can construe the amending acts of the Act of 1907 in a way that will sustain their constitutionality which will be not inconsistent with the opinion of the Supreme Court of the United States. The [fol. 163] very thorough argument and the very researchful brief of counsel for the defendant here has convinced us that the whole history of Pennsylvania tax legislation, and its interpretation for three quarters of a century, demonstrates that this can be done.

The interpretation of the statutes imposing the Capital Stock Tax, the Corporate Loans Tax, the Tonnage Tax, Gross Receipts Tax, Collateral Inheritance Tax, Direct Inheritance Tax, and Mercantile License Tax, all show that it has been the policy of the Legislature of Pennsylvania, at least since 1840, to make the language of taxing statutes broad so as to include everything that could be properly included, rather than take the chance of cataloging numerous exceptions to the otherwise broad language, and

thereby possibly fail to enumerate all the necessary exceptions. The Legislature of Pennsylvania in its various sessions must be presumed to have known that when it used all-inclusive language it did it with the full knowledge that that language may be constitutionally restricted in its application rather than to attempt to legislate into the statute all necessary constitutional exceptions.

The history of the Capital Stock Tax is enlightening. The Act of June 11, 1840, P. L. 612, supplemented by the Act of April 29, 1844, P. L. 498, imposed a tax of "one-half mill on every dollar of the value of the stock of all * * * companies whatsoever," incorporated under any law of this Commonwealth.

The Trenton Bridge Company was incorporated both in New Jersey and Pennsylvania and owned a bridge across [fol. 164] the Delaware River, one-half of which was in each state. The taxing officers imposed a tax on the entire capital of the company. In the case of Pennsylvania v. Trenton Bridge Co., 9 Am. L. Reg. (O. S.) 298 (1860), Judge Pearson held:

"Although the imposition of taxes is strictissimi juris, and never to be *extended* by intendment, yet it may be *limited* by fair equitable consideration, so as not to embrace objects coming within the words, yet out of the intention of the Legislature."

He decided that the Commonwealth could tax only one half of the capital.

In the case of Commonwealth v. Standard Oil Company, 101 Pa. 119 (1882), a tax was settled under several acts imposing a tax upon the capital stock of every company incorporated under the laws of this Commonwealth or by any other state and doing business in this Commonwealth. The acts, in terms, imposed the tax on all of the capital stock and provided for no deduction. The Commonwealth in that case, as in the Schuylkill Trust Company case, contended that it was entitled to the tax under the letter of the statute without deductions. Judge Simonton held, page 132:

"These taxing acts must confine the imposition of the tax to so much of the capital stock of defendant as was, * * * represented by property and business of the defendant within the state."

The Supreme Court, speaking through Mr. Justice Paxson, said, page 146:

"To the extent that it brought its property here it is tax-[fol. 165] able, and no further. An act of assembly must have a reasonable construction. When it says 'all' horses, 'all' carriages shall be taxed, it does not mean all horses and all carriages in the state of Ohio. It refers to all such things as are within the jurisdiction of the taxing power. Regarding the words 'capital stock' in the act of assembly as the equivalent of the property and assets of the corporation, we must construe them to mean so much of the capital stock measured by the property actually brought within the state by the company in the transaction of its business."

In the case of Commonwealth v. Pennsylvania Coal Co., 41 Leg. Int. 125 (1884), precisely the same conclusion is reached in the opinion by Judge McPherson.

In the case of Commonwealth v. D. L. & W. R. R. Co., 145 Pa. 96 (1891), the Supreme Court held that so much of the capital stock of the defendant as was represented by the leasehold of another railroad located entirely outside of Pennsylvania, real estate outside of Pennsylvania, and vessels, barges and tugs built, registered and used outside of Pennsylvania, could not be taxed in Pennsylvania.

Prior to 1891 a multitude of cases sustained the same proposition: Commonwealth v. Lack. I. & C. Co., 129 Pa. 346, 356 (1889); Commonwealth v. Pennsylvania Co., 145 Pa. 266, 273, (1891); Commonwealth v. American Dredging Co., 122 Pa. 386 (1888); Pullman Palace Car Co. v. Penna., 107 Pa. 156 (1884); Pullman Palace Car Co. v. Penna., 141 U. S. 18 (1891); Commonwealth v. National [fol. 166] Transit Co., 5 Pa. C. C. 90, Note (1884); Commonwealth v. Montgomery L. & Z. Mining Co., 5 Pa. C. C. 89 (1888); Commonwealth v. Western Union Tel. Co., 15 W. N. C. 331; 17 Phila. 602 (1884); Commonwealth v. Western Union Tel. Co., 2 Dauphin 40 (1880); Commonwealth v. Westinghouse Elec. & Mfg. Co., 151 Pa. 265 (1892); Commonwealth v. Westinghouse Elec. & Mfg. Co., 151 Pa. 276 (1892); Commonwealth v. Philadelphia Company, 157 Pa. 527 (1893); Commonwealth v. Edison Elec. L. Co., 157 Pa. 527 (1893); Commonwealth v. Pullman Palace Car Co., 13 Pa. C. C. 54 (1893).

It was therefore settled that prior to 1891 the taxing statutes imposing a tax upon all the capital stock of domestic or foreign corporations, allowing no deductions whatever, in terms, in the language of the statutes, were not unconstitutional for that reason, but simply did not reach property outside of the state, and could not be constitutionally applied to tax such property.

By Section 20 of the Act of June 1, 1889, P. L. 420, amended by the Act of June 8, 1891, P. L. 229, it was made the duty of the president of every corporation of this Commonwealth and every corporation "of any other state • • • doing business in and liable to taxation within this Commonwealth • • • to make a report in writing." Section 21 of that act as thus amended imposed a tax "upon each dollar of the *actual* value of its *whole* capital stock of all kinds." Both Section 20 of the act which required the report, and section 21 which imposed the tax, were frequently amended down to and including 1935, but the comprehensive language requiring reports from all companies, [fol. 167] both foreign and domestic, and the imposition of a tax upon "the actual value of its *whole capital stock of all kinds*" was not in any way limited by any exceptions or provisions for deductions, notwithstanding the legislature knew that investments in property outside the state, in patent rights and in United States securities, could not be taxed. It has never been held because the Act of 1891 and its amendments did, by the language of the act, include these things, that the act itself was unconstitutional. The act has been consistently upheld, while a multitude of cases have held that it could not constitutionally reach the exempted capital in the application of the act and the settlement made under it.

In Delaware, Lack. & Western R. R. Co. v. Pennsylvania, 198 U. S. 341, reversing 206 Pa. 645, the attempt was made to tax coal which was mined in Pennsylvania and shipped into other states and stored there awaiting sale. The Supreme Court of the United States held that the coal was beyond the taxing power of the state, but did not declare the statute unconstitutional because the language was broad enough to include the coal. It declared the settlement, and not the statute, unconstitutional.

In Commonwealth v. Westinghouse Air Brake Co., 251 Pa. 12, the Supreme Court of Pennsylvania held that the state had no power to impose a tax upon so much of the

capital stock of the defendant, a domestic corporation, which was represented by property actually located in Wisconsin and Canada. The Court said:

"The difficulty is not with the law but with the facts. • • • Deductions for property permanently located out- [fol. 168] side of Pennsylvania cannot be regarded as an exemption within the meaning of the Act of June 1, 1889, P. L. 420, and its supplements. *Deductions of this character do not depend upon express legislative authority* • • •. (Italics ours) Where the valuation of capital stock includes tangible property, which is beyond the jurisdiction of the State, it is to that extent at least the taking of property without due process of law, and therefore in violation of the Fourteenth Amendment to the Federal Constitution."

There are a large number of authorities in which implied deductions have been allowed by the courts because the settlement was unconstitutional, but in no case did the court decide the Act of 1891 itself was unconstitutional in that it did not allow them in terms. See Commonwealth v. Lehigh C. & N. Co., 162 Pa. 603, 613; Commonwealth v. Provident L. & T. Co., 9 D. R. 479; Commonwealth v. Western Union Tel. Co., 29A Dauphin 245.

The same judicial attitude has been taken in the construction of the statutes imposing the Corporate Loans Tax. By Section 32 of the Act of April 29, 1844, P. L. 486, a tax was imposed on "all • • • • money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment." The Act of May 1, 1854, P. L. 535, provided that "all bonds or certificates of loans of any railroad company incorporated by this Commonwealth, be and the same shall be liable to taxation for State purposes only." By Section 3 of the Act of April 30, 1864, P. L. 218, [fol. 169] the officer of any company which paid interest to its bondholders or creditors was required to deduct the tax from the interest and pay the same to the state treasurer. In the case of Maltby v. Reading & Columbia R. R. Co., 52 Pa. 140 (1866), the Supreme Court of Pennsylvania held that the proper officer of the company was required to deduct the tax whether the holder was a resident or non-resident, but this was reversed by the case of State Tax on Foreign Held Bonds, 15 Wall. 300 (1872).

When the question arose as to whether all the bonds of a railroad which was incorporated and operating in several states, including Pennsylvania, were taxable, the courts held that all the bonds should not be taxed, but that the entire bonded indebtedness should be apportioned on a mileage basis, notwithstanding the statute, in terms, taxed all bonds. Pitts. Ft. W. & Chicago Ry. Co. v. Commonwealth, 66 Pa. 73.

Section 1 of the Act of June 30, 1885, P. L. 193, imposed a tax in language similar to that above quoted from the Act of 1844, and Section 4 of that act imposed the duty upon the treasurer of every domestic and foreign corporation doing business in this Commonwealth to assess and deduct the tax when paying the interest to residents of this Commonwealth, but it was said in the case of N. Y., L. E. & W. R. R. Co. v. Pennsylvania, 153 U. S. 628, 645, reversing 150 Pa. 234 and 145 Pa. 57:

"It assumes to do what the State has no authority to do, compel a foreign corporation to act, *in the State of its* [fol. 170] *creation,* as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania."

The court in that case held that the state could not constitutionally impose that duty upon the foreign treasurer although the language of the act was broad enough to do it, but the act itself was not declared unconstitutional.

To the same effect are D. & H. Canal Co. v. Pennsylvania, 156 U. S. 200; Commonwealth v. Barrett Mfgr. Co., 246 Pa. 301; Commonwealth v. N. Y. C. & H. R. R. Co., 14 Dauphin 68; Commonwealth v. Hershey Creamery Co., Dauphin (C. P.) No. 150 Commonwealth Docket 1935 (March 9, 1936).

This Commonwealth for a while had a tax known as the Tonnage Tax, imposed by the Act of August 25, 1864, P. L. 988, which, in terms, levied a tax upon each ton of freight carried from the state to other states or foreign countries, or brought into the state from outside. In the case of State Freight Tax, 15 Wall. 232, the Supreme Court of the United States did not strike down the whole act as unconstitutional, but concluded (P. 282):

"The Act * * * so far as it applies to articles carried through the State, or articles taken up in the State and

carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void."

The same consistent construction has been adhered to in the cases involving the Gross Receipts Tax, first im- [fol. 171] posed by the Act of February 23, 1866, P. L. 82, upon "every railroad, canal and transportation company." This language was all inclusive, but the Supreme Court of the United States, in State Tax on Railway Gross Receipts, 15 Wall. 284, held that it could not be imposed upon the receipts from freight transported in interstate commerce, although the language was broad enough to include it. The Supreme Court, however, did not strike down the act.

The Acts of March 20, 1877, P. L. 6, and June 7, 1879, P. L. 112, imposed a gross receipts tax upon every steamboat company and transportation company "engaged in the business of transporting freight or passengers." Although the act imposed a tax on all gross receipts, the Supreme Court of the United States held that it could not reach either the receipts from property or passengers transported in interstate commerce. State Freight Tax, 15 Wall. 232; Phila. & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326. In the State Freight Tax case the Supreme Court of the United States said (340): The law might be valid as to one class, and unconstitutional as to the other.

See also Commonwealth v. D. & H. Canal Co., 4 Dauphin 154; Commonwealth v. N. Y. L. E. & W. R. R. Co., 21 W. N. C. 410; 22 W. N. C. 525; Commonwealth v. D. L. & W. R. R. Co., 4 Dauphin 192; Commonwealth v. L. V. R. R. Co., 4 Dauphin 174.

The treatment of the Collateral Inheritance Tax is consistent with that heretofore discussed. That tax was imposed upon:

"All estates • • • situated within this state • • • and all such estates situated in another state, territory, or [fol. 172] country, when the person or persons dying seised thereof shall have their domicile within this commonwealth."

In Bittinger's Estate, 129 Pa. 338, 345, the court held that the tax could not be imposed upon real estate in Maryland, but did not hold the act unconstitutional.

The Direct Inheritance Tax of June 20, 1919, P. L. 521, provides:

"A tax * * * is hereby imposed upon the transfer of any property, real or personal * * * when the transfer is by will or by the intestate laws of this Commonwealth, * * * whether the property be situated within this Commonwealth or elsewhere."

It has, however, been held that no real estate or tangible property located outside the State can be taxed under the act. Frick v. Pennsylvania, 268 U. S. 473; Robinson's Estate, 285 Pa. 308; Paul's Estate, 303 Pa. 330.

So also has the Mercantile License Tax received similar treatment. The Act of May 2, 1899, P. L. 184, imposes upon the vendors of merchandise a tax "on each dollar of the whole volume, gross, of business transacted annually." In the case of Crew Levick Company v. Pennsylvania, 245 U. S. 292, a tax was imposed upon $430,000 worth of merchandise sold by the appellant and delivered from its warehouse in Philadelphia to customers in foreign countries. The Supreme Court of the United States held that the "*imposition* of the tax was unconstitutional because the [fol. 173] sale was in interstate commerce," but the court did not strike down the whole act, and the statute is still in the statute books and enforced.

The Commonwealth argues that these cases are to be distinguished because they show that the settlements under the various acts were attempts to reach property not within the jurisdiction of the Commonwealth and that the situation before us is quite different so far as the Act of 1907 is concerned, because the Legislature was dealing with property wholly within its jurisdiction and that, when the Legislature authorized certain deductions and no others, it was a discrimination. We cannot follow this distinction. In the one class of cases there was an attempt to reach property beyond the physical jurisdiction while in this class the attempt was to reach property beyond the legal jurisdiction. The language of the taxing acts would have reached property outside of the State. In the application of the taxing acts, which we have reviewed, as in the trust company acts, the attempt was made to reach something beyond the grasp of the State. Instead of writing something into the Act, as is contended by the Commonwealth, if we adopt the re-

stricting provisions we are doing exactly what was done in the taxing statutes, namely, applying the language to the extent that the Constitution permits its application. We see no distinction between a case which holds that even though the statute taxes the "whole capital stock" that portion of it represented by property outside of the State cannot be taxed and a case which holds that the shares of national banks or Federal securities shall not be taxed where the statute says that shares shall not be taxed, insofar as they represent capital stock or shares of other companies [fol. 174] which have been taxed or relieved therefrom. In both cases precisely the same fundamental inquiry must be made, namely, what does the language of the statute constitutionally include? It makes no difference whether the limitation is applied to an affirmative or a negative provision such as an exemption. The principle is the same. As stated in Endlich on Interpretation of Statutes, Sec. 179:

" 'It is a safe and wholesome rule to adopt the restricted construction of a statute, when a more liberal one will bring us in conflict with the fundamental law,' indeed to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply."

We find no case in which the courts have struck down the statute in toto, merely because there was an attempt to reach what was constitutionally exempted where the statute was capable of a constitutional interpretation.

Certainly the Legislatures of Pennsylvania, during the large part of a century had this principle in mind in passing these statutes with all-inclusive language, not intending that they should be enforced to violate the Constitution, but intending, as the courts had led the legislature to believe, that they could be constitutionally construed to include everything which the language could constitutionally embrace.

Should the Act of 1929 and the prior amending acts of the Act of 1907, be stricken down because they did not, in [fol. 175] terms, say that federal securities should be proportionally exempted to the extent that they were paid out of capital, surplus and undivided profits, and that the investments in stock of national banks should be wholly exempted because they had been otherwise taxed? It is not

only a dangerous method but poor legislative drafting to use all-inclusive language and then, by a process of provisos or exceptions, attempt to take out of the operation of that language everything that the courts or the Constitution may have theretofore taken out. It is far better to use the inclusive language under the assumption that the well-known and well-applied principle that the statute cannot be constitutionally enforced, will be observed by the enforcing officers and the courts.

Let us assume that this statute with its comprehensive language had a proviso in it something like this: "This act shall not be construed to tax anything which is exempt under the Constitution of the State or of the United States." Would the act be any better because of such a worthless provision? Let us assume then the proviso, in terms, exempted the stock of national banks but did not refer to federal securities; should the act be stricken down merely because it, in terms, eliminated one exempted class when, in fact, it could not constitutionally reach the other?

Justice Roberts said, in the Schuylkill Trust Company Case, inter alia:

"If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the [fol. 176] remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the state, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities."

But what if the burden be lifted alike from all within the class? We are of opinion that the Supreme Court of the United States did not intend to strike down the amending statutes of the Act of 1907, but did intend to hold that "as so construed and applied by the Department and the courts" "in the assessment of a tax for the year 1930," the act is unconstitutional.

Counsel for the Schuylkill Trust Company seriously contends that there is nothing to do in that case but enter judgment for the defendant company while the Commonwealth contends that the proviso of the Act of 1907 which allows deductions is only an inducement for the trust company to pay the tax, a sort of a discount for prompt payment and therefore it does not discriminate. It is argued that the authority for the Auditor General to assess the tax contains no provision for deduction. Under the Act of 1907 a report was not required until the 20th of June, and while the Auditor General, of course, could not assess the tax until he [fol. 177] received the information in the report, permission was given to the company to assess the tax, in the first instance, and pay on or before the first of March, before the tax year ended, deducting so much of the capital stock "as is not invested in the shares of stock liable to pay a capital stock tax or tax on shares." Let us assume that 90% of all trust companies availed themselves of the deduction for prompt payment. It is difficult to conceive how this inducement could operate otherwise than as a discrimination against United States banks and Federal securities if practically the same provision in the Act of 1929 so operates.

The Commonwealth relies on the case of Commonwealth v. Mortgage Trust Company, 227 Pa., 163. But that case is not in point as to any question now before us. It simply sustained the Act of 1907. No question was raised of the invalidity of the exemption contained in the proviso.

If the amendments of 1923, 1927 and 1929 are unconstitutional in that they allow a discrimination against United States securities, then what we have called the second proviso of the Act of 1907 permits the same discrimination. We cannot escape that conclusion. That proviso allows all trust companies who paid the tax before the first of March to deduct from the taxable assets "so much of the capital, surplus and undivided profits as is not invested in shares of stock of a corporation liable to pay to the Commonwealth a capital stock tax or a tax on shares." Every trust company in the state could take advantage of that exemption. The only way that the Act of 1907 has been changed is to extend the exemption to all corporations [fol. 178] whether they pay before March 1st or not and to enlarge the exemption to the investment in the stock of cor-

porations "relieved from the payment of a capital stock tax or tax on shares" as well as to those liable to pay such tax. The conclusion is irresistible that if the amendments are wholly void because of this exemption, that portion of the Act of 1907, at least, is also wholly void, insofar as it discriminates because the language does not explicitly exempt United States securities and national banks. It is just as odious in the Act of 1907 as in the amending acts.

It might be a serious question whether we could say that this provision of the Act of 1907 is separable and severable from the remainder of the act, particularly since it carries out, pro tanto, a legislative policy to avoid double taxation asserted for more than a half a century. But courts never attempt to separate a valid from an invalid part of a statute, so long as the whole can be constitutionally construed and applied. However, in view of our conclusion that not only the Act of 1907 but the amending acts may be constitutionally interpreted, we need not determine this question.

What deduction should be made on account of the ownership of United States securities? In the case of Commonwealth v. Provident Trust Co., 40 Dauphin 146, we discussed this question at length. We there held, following the case of Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375, that since the tax was a tax on shares, if the appellant proved that its investment was out of capital, surplus and undivided profits it was entitled to a flat deduction. If there were no such proof it would be entitled to a propor- [fol. 179] tionate deduction. The Provident Trust Company case was affirmed in 319 Pa. 385. The dissenting opinion in the case of Schuylkill Trust Co. v. Pennsylvania agrees that the tax is a tax on shares. The Supreme Court of Pennsylvania has held the tax to be a tax on shares, and the Supreme Court of the United States, in the majority opinion, has said that it is not necessary to determine the nature of the tax. We, therefore, adhere to the conclusion that this tax is a tax on shares, and, there having been no proof that the United States securities were purchased out of capital, surplus and undivided profits, there can be only a proportionate deduction.

What deduction is to be made with reference to the shares of stock of national banks? The permission given to a state to tax the shares of stock of national banks is found in R. S. 5219 U. S. C. A., Title 12, Sec. 548, and the authority to levy the Pennsylvania tax is contained in the Act of July 15,

1897, P. L. 292. In the Schuylkill Trust Company case both the majority and the minority opinions conclude, following the case of Bank of California v. Richardson, 248 U. S. 476, that when the shares of stock of a national bank have been taxed once under the permission given by Congress, they cannot be taxed again, either directly or as part of the value of the stock or shares of another corporation. It therefore follows that the full deduction must be allowed for the investment of this appellant in the shares of national banks.

2. What deduction should be made of the assets represented by the ownership of shares of stock of other corporations? This question was fully discussed and determined in [fol. 180] the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385. We there held:

1. If such securities were purchased out of capital, surplus and undivided profits the full market value should be deducted, otherwise a proportionate deduction should be made.

2. Where the proportionate deduction is made the following formula should be applied:

(a) The numerator to consist of capital, surplus and undivided profits determined by the book value, less the book value of those shares, if any, for which a full deduction has been made.

(b) The denominator to consist of the book value of permanent investments less the book value of those shares, if any, for which the full deduction has been made.

(c) The multiplicand to be the book value of the shares which are apportioned.

(d) The result to be increased or decreased by the amount of appreciation or depreciation of the shares which are apportioned.

It is not necessary to add anything to the discussion and conclusion which we reached in the Provident Trust Company case.

3. Is the defendant entitled to a deduction for the value of all of its shares which are held by persons or corpora- [fol. 181] tions resident or domiciled in other states? The

Supreme Court of Pennsylvania has decided in the Schuylkill Trust Company and the Provident Trust Company cases that the appellant is not entitled to any deduction on account of shares by non-residents or by foreign corporations. The Supreme Court of the United States, although that question was raised in the Schuylkill Trust Company case, did not pass upon it. We, therefore, adhere to the decisions in the former cases. It follows that no deduction can be allowed.

4. The specifications of objection raised the question as to whether shares of the defendant company owned by charitable, religious and educational institutions are taxable. Inasmuch as the defendant has already overpaid the tax for the year in question it would not have any effect upon our judgment to allow any further deductions. Therefore it is not necessary to decide this question.

Conclusions of Law

1. In the enactment of the Acts of June 13, 1907, P. L. 640, July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, the legislature intended to impose a tax upon the shares of stock of trust companies by adding together the value of the capital, surplus and undivided profits and deducting therefrom the full value of shares of stock of national banks and of Federal reserve banks, and so much thereof as is invested in the shares of stock of other corporations liable to or relieved from a tax on capital stock or shares or in securities issued by the United States Government, its agencies, instrumentalities or dependencies.

[fol. 182] 2. The acts above referred to must be construed so as to provide that, in computing the taxable value of the shares of stock of a trust company, the deductions expressly provided for by said acts should be made, and that such other deductions should be made as are necessary to avoid discrimination in favor of the classes of securities specified therein and against the shares of stock of national banks or Federal reserve banks or against securities issued by the United States Government, its agencies, instrumentalities or dependencies, in order that the intention of the legislature may be carried into effect, and conflict with the

statutes and Constitution of the United States may be avoided.

3. The acts above referred to, as they have been construed and applied by the taxing officers of the Commonwealth in the settlement of the tax against the appellant, are unconstitutional and void, but those statutes, when so construed and applied as to avoid any discrimination against securities of the United States, its agencies, instrumentalities and dependencies and of national banks, are constitutional.

4. In computing the taxable value of the shares of the appellant the full reported market value of the shares of stock of the Central National Bank, the Philadelphia National Bank and the Federal Reserve Bank owned by appellant should be deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets.

5. By reason of the ownership of the appellant of shares of stock of other corporations which are liable to pay a tax on their capital stock or shares, and of securities issued by [fol. 183] the United States Government or its agencies, instrumentalities or dependencies, which securities have not been shown to consist entirely of investments of capital, surplus and undivided profits of the appellant, it is entitled, in computing the taxable value of its shares, to have deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets, a proportion of the value of all such securities, as determined by the following formula:

(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned.

6. The situs of the shares of stock of a trust company for purpose of taxation is the domicile of the company.

7. The appellant is not entitled to have deducted in the settlement of the taxable value of its shares those shares which are held by persons or corporations resident or domiciled outside of the State of Pennsylvania.

8. The defendant having paid on account more than should have been legally settled against it for the tax year 1929, [fol. 184] according to the statement herein contained, judgment must be entered in favor of the defendant and against the Commonwealth.

Computation of Tax for the Year 1929

Capital Stock (Average for the year)		$3,645,833.00
Surplus (Average for the year)		12,729,166.00
Undivided Profits		1,469,112.00
Capital, Surplus and Undivided Profits at book value		$17;844,111.00
Appreciation		4,218,402.00
Total Capital, Surplus and Undivided Profits at market value		$22,062,513.00
Less—deductions for exempt shares of stock and United States Securities:		
A. Full deduction for shares of National Banks and Federal Reserve Bank	$877,141.00	
B. Proportionate deduction for United States securities and exempt shares of stock	11,324,752.00	
Total deductions		12,201,893.00
Taxable value of all the shares		$9,860,620.00
Tax on all shares, at 5 mills		$49,303.10
Amount paid on account		70,000.00
Balance		None

[fol. 185] This opinion is filed giving our reasons for the judgment which was entered in favor of the defendant in this case April 20, 1936.

Wm. M. Hargest, P. J.

IN COURT OF COMMON PLEAS

EXCEPTIONS OF THE SCHUYLKILL TRUST COMPANY, DEFENDANT

And Now, May 7, 1936, the Schuylkill Trust Company, defendant above named, by its attorney, John Robert Jones, excepts to the findings, the conclusions of law and the judgment directed to be entered by the learned court and specifies the following exceptions thereto:

1. The Commonwealth having presented a petition to the court praying the court to enter judgment against the defendant by the imposition of a tax under the first proviso of the Act of June 13, 1907, P. L. 640, without allowing any deductions, upon the ground that such was the mandate of the Supreme Court of the United States in the instant case, and the court upon such petition having granted a rule upon the defendant to show cause why judgment should not be entered in accordance with such prayer and the defendant having demurred to the rule, reserving the right to answer, upon the ground, inter alia, that the court had no jurisdiction to enter judgment for tax against the defendant under authority of the mandate of the Supreme Court of the United States but on the contrary under the mandate of said court it was required that judgment be entered in [fol. 186] favor of the defendant with costs, the learned court erred in not sustaining the demurrer of the defendant.

Overruled. The object of the petition has been accomplished. The Court entered judgment without the necessity of passing on the demurrer.

2. The learned court erred in that, not having sustained the demurrer filed by the defendant and having denied to the defendant the right to answer the petition of the Commonwealth and the rule issued by the court upon such petition, by the judgment which it directed to be entered against the defendant April 20, 1936, it discriminated against the

defendant and its shareholders in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled. The purpose of the petition referred to and the rule granted thereon was simply to get a concise statement of what judgment should be entered in the light of the divergent views of counsel. The defendant was accorded as full a hearing as if no petition had been presented or rule granted.

3. The learned court erred in that having prescribed the formula which it held should be applied to the defendant and which formula required a determination of the book values of the capital, surplus and undivided profits, the [fol. 187] book value of the shares of stock for which a full deduction was to be allowed, the book value of "permanent investments" and the book values of assets which the court held were exempt and non-taxable, it nevertheless entered a judgment which did not comply with such formula and without giving the defendant a hearing and an opportunity to establish the book values of such assets and "permanent investments" and to present evidence to show what portion, if any, of the assets which the court held to be exempt and non-taxable and therefore deductible were purchased out of the amount of capital stock paid in, surplus and undivided profits, though such hearing and opportunity were given other trust companies held subject to the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the court directed the entry of judgment against the defendant April 20, 1936, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled. See answer to Fifth Exception.

4. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"There is no evidence in the instant case that any of the United States securities were purchased out of capital, surplus or undivided profits."

Overruled.

[fol. 188] 5. The learned court erred in that it made a tax settlement against the defendant by the application of a method of settlement in accordance with which and upon which it directed the entry of judgment against the defendant April 20, 1936 without the evidence and the findings of facts essential to the application of such method of tax settlement and the entry of such judgment, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled. This case was originally heard by this court de novo with full opportunity to present any facts affecting the amount of tax. When the case was returned under the mandate of the Supreme Court of the United States it was to enter judgment on the record, not to open the case to make a new record. The formula to be applied was settled in the case of Commonwealth v. Provident Trust Co., 40 Dau. 146; 41 Dau. 1; 319 Dau. 385.

6. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"The case, however, was argued on the merits, and inasmuch as we have the contentions of the parties now submitted to us it is not necessary to determine the matter upon the petition and rule."

Overruled.

[fol. 189] 7. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"The questions involved were: 1. What deduction should be made because of the ownership by the defendant of the stock of the Philadelphia National Bank and of United

States securities? 2. Is the defendant entitled to have deducted from the settlement the taxable value of all its shares which are held by persons or corporations resident and domiciled in other states of the United States?"

Overruled.

8. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"We are bound to place such a construction upon a statute as will sustain its constitutionality, if it is susceptible of such construction. We do not regard the mandate of the Supreme Court of the United States as definitely determining that these amending acts are unconstitutional and worthless as so much waste paper. We are of opinion that the way is still open to the Pennsylvania courts to limit their application so that they will be free from any discrimination against United States securities or the shares of national banks."

Overruled.

[fol. 190] 9. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"Our conclusion is that if a full deduction is made for the investment in the shares of national banks and a full deduction is made for the investment of the shares of United States securities, when it is shown that those securities have been purchased out of capital, surplus or undivided profits, and a proportionate deduction is made for United States securities when it is not shown that they have been purchased out of capital, surplus and undivided profits, there would be no unconstitutional application of these amending statutes."

Overruled.

10. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"• • •, in ascertaining the taxable value of the shares of trust companies, the following formula should be applied:

"1. The full market value of all securities must be deducted, if they be wholly investments of capital, surplus

and undivided profits. Otherwise a proportionate deduction is to be made.

"2. Where a proportionate deduction is to be made it should be according to the following:

"(a) The numerator to consist of the capital, surplus and undivided profits determined by the book values, less [fol. 191] the book value of those shares, if any, for which a full deduction has been made.

"(b) The denominator to consist of the book value of permanent investments, less the book value of those shares, if any, for which the full deduction has been made.

"(c) The multiplicand to be the book value of the shares which are apportioned.

"(d) The result thus obtained to be increased or decreased by the amount of appreciation or depreciation of the shares which are apportioned.

"We see no reason for departing from this formula in the instant case. It must be amplified by allowing a full deduction for national bank shares."

Overruled.

11. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"2. The defendant contends that the taxable value of all its shares which are held by persons or corporations resident or domiciled in other states of the United States should be deducted in arriving at the settlement.

"Inasmuch as we have decided in the case of Commonwealth v. Provident Trust Company, supra, and in this case that it is not entitled to such deduction, the tax being a tax on shares, and both of those cases having been affirmed by the Supreme Court of Pennsylvania, and while the question was raised in the Supreme Court of the United States [fol. 192] it was not passed upon, we are still bound to follow the decision of the Supreme Court of Pennsylvania and we, therefore, conclude that the defendant is not entitled to such deductions."

Overruled.

12. The Conclusions of Law found by the court and numbered 1, 2, 3, 4, 5, 6, 7 and 8, respectively, being interrelated and embodying the formula and method of settlement which the court holds to be the basis of the judgment which it directed to be entered against the defendant April 20, 1936, are erroneous and in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States and are accordingly excepted to as a whole and separately.

Overruled.

13. The learned court erred in its 1st Conclusion of Law which reads as follows:

"1. In the enactment of the Acts of June 13, 1907, P. L. 640, July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, the legislature intended to impose a tax upon the shares of stock of trust companies by adding together the value of the capital, surplus and undivided profits and deducting therefrom the full value of shares of stock of national banks and of Federal reserve banks, and so much thereof as is invested in the shares of stock of other corporations liable to or relieved from a tax on cap- [fol. 193] ital stock or shares or in securities issued by the United States Government, its agencies, instrumentalities or dependencies."

Overruled.

14. The learned court erred in its 2nd Conclusion of Law which reads as follows:

"2. The acts above referred to must be construed so as to provide that, in computing the taxable value of the shares of stock of a trust company, the deductions expressly provided for by said acts should be made, and that such other deductions should be made as are necessary to avoid discrimination in favor of the classes of securities specified therein and against the shares of stock of national banks or federal reserve banks or against securities issued by the United States Government, its agencies, instrumentalities or dependencies, in order that the intention of the legislature may be carried into effect, and conflict with

the statutes and Constitution of the United States may be avoided."

Overruled.

15. The learned court, being without legislative power and being bound by the decision of the Supreme Court of Pennsylvania in the instant case filed June 30, 1934 (315 Pa. 429), erred in so much of its 3rd Conclusion of law as reads as follows:

"3. The acts above referred to, * * *, when so construed and applied as to avoid any discrimination against securities of the United States, its agencies, instrumentali-[fol. 194] ties and dependencies and of national banks, are constitutional."

Overruled.

16. The learned court, being without legislative power and being bound by the decision of the Supreme Court of Pennsylvania in the instant case filed June 30, 1934 (315 Pa. 429), erred in its 4th Conclusion of Law which reads as follows:

"4. In computing the taxable value of the shares of the appellant, the full reported market value of the shares of stock of the Philadelphia National Bank owned by appellant should be deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets."

Overruled.

17. The learned court erred in its 5th Conclusion of Law which reads as follows:

"5. By reason of the ownership of the appellant of shares of stock of other corporations which are liable to pay a tax on their capital stock or shares, and of securities issued by the United States Government or its agencies, instrumentalities or dependencies, which securities have not been shown to consist entirely of investments of capital, surplus and undivided profits of the appellant, it is entitled, in computing the taxable value of its shares, to have deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its

[fol. 195] assets, a proportion of the value of all such securities, as determined by the following formula:

"(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

Overruled.

18. The learned court erred in its 6th Conclusion of Law which reads as follows:

"6. The situs of the shares of stock of a trust company for the purpose of taxation is the domicile of the company."

Overruled.

19. The learned court erred in its 7th Conclusion of Law which reads as follows:

"7. The appellant is not entitled to have deducted in the settlement of the taxable value of its shares those shares which are held by persons or corporations resident or domiciled outside of the State of Pennsylvania."

Overruled.

[fol. 196] 20. The learned court erred in its 8th Conclusion of Law which reads as follows:

"8. Judgment must be entered in favor of the Commonwealth and against the defendant."

Overruled.

21. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"From what me have said in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket

1933, we conclude that for the purpose of taxation the following is a correct

"Statement

"Capital Stock, Surplus and Undivided Profits (book value)		$441,667
Appreciation		25,247
Capital, Surplus and Undivided Profits (market value)		$466,914
Less:		
A. Full deduction for shares of National Banks	$20,202	
B. Proportionate deduction for United States Securities and exempt shares of stock, $\frac{446,712}{3,735,680} \times 286,994 =$	34,318	54,520
Taxable Value of Capital Stock		$412,394
[fol. 197] Tax on same at 5 mills	$2,061.97	
Amount paid on account	570.43	
Balance due the Commonwealth	1,491.54	
Interest from April 8, 1933	223.73	
Total	1,715.27	
Attorney General's Commission of 5%	85.76	
Total	$1,801.03	
Less the costs allowed to the appellant in the mandate of the Supreme Court of the United States	344.00	
	$1,457.03"	

Sustained and judgment modified. See opinion.

22. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"For the reasons given in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard

Trust Company, No. 162 Commonwealth Docket 1933, filed herewith, we directed judgment to be entered as above indicated April 20, 1936.

Wm. M. Hargest, P. J."

Sustained and judgment modified. See opinion.

23. The learned court erred in directing the following judgment to be entered:

[fol. 198] "And now, April 20, 1936, for the reasons given in an opinion hereafter to be filed in this case and in the case of Commonwealth of Pennsylvania v. Girard Trust Co. No. 162 Commonwealth Docket, 1933, judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1801.03, less, however, the allowance of costs to the said Schuylkill Trust Company of $344 fixed by the mandate of the Supreme Court of the United States, unless exceptions be filed within the time limited by law.

"Wm. M. Hargest, P. J."

Sustained and judgment modified. See opinion.

24. The learned court erred in not directing judgment to be entered in favor of the Schuylkill Trust Company, the defendant, and against the Commonwealth of Pennsylvania, the plaintiff, together with costs.

Overruled.

25. The learned court erred in that it held that a method of settlement described in its opinion as the method of settlement which was applied by it "In the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385," is a method of settlement which is consistent with the opinion of the Supreme Court of the United States and complies with its mandate in the instant case.

Overruled.

[fol. 199] 26. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 was determined in amount by a method of settlement which differs from the method of settlement which in its opinion it declared to be the proper method of settlement

and which it described in its opinion as the method of settlement applied in the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385 (1935).

Overruled.

27. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 was determined in amount by a method of settlement which differs from the method of settlement which was applied to other trust companies for the same and other tax years under authority of the said Act of April 25, 1929, Pamphlet Laws 673, and in the cases of the Provident Trust Company, 40 Dauph. 146, 41 Dauph. 1, and the Girard Trust Company, Court of Common Pleas of Dauphin County, No. 162, Commonwealth Docket, 1933, to both of which the court refers, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

[fol. 200] 28. The learned court erred in that its construction and application of the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, by the judgment directed to be entered against the defendant April 20, 1936 constitute judicial legislation amending the statute by writing into it a provision granting additional exemptions from taxation in violation of Section 1 of Article II of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

29. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 violates the opinion, judgment and mandate of the

Supreme Court of the United States, (November 11, 1935) (296 U. S. 113).

Sustained and judgment modified. See opinion.

30. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void, being in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

[fol. 201] 31. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void, being in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States.

Overruled.

32. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax upon and discriminates against United States securities owned by the defendant in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States, Section 3701 Revised statutes of the United States, 31 U. S. C. Sec. 742, which exempts obligations of the United States from state taxation and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

33. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, [fol. 202] Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax upon and discriminates against Philippine Islands bonds owned by the defendant in violation of the provisions of the Act of Congress of the United States of August 29, 1916 c. 416, 39 Stat. 548, Sec. 11, Act of Congress of the United States of July 21, 1921, c. 51, 42 Stat. 145, and Act of the Philippine Legislature Number 2940 approved February 5, 1921, Act of Congress of February 6, 1905, c. 453, 33 Stat., part 1, 689, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

34. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax upon and discriminates against Joint Stock Land Bank bonds owned by the defendant in violation of the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916, c. 245, 39 Stat. 360, Sec. 16, Sec. 26, Clause 2 of Section 8 of Article I of the Constitution of the [fol. 203] United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

35. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamph-

let Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it has been held to authorize the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks "flat," i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits which is the value of the net assets, irrespective of whether or not such shares of stock were purchased out of the capital stock paid in, the surplus and undivided profits, and to authorize the apportionment of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a class of assets owned by the defendant and described in the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares, between the amount of its capital stock paid in, the surplus and undivided profits (the value of the net assets) and the amount of its liabilities, for the purpose of determining what portion of the value of the said United States securities, Philippine Islands bonds, Joint Stock [fol. 204] Land Bank bonds and shares of stock is to be deducted from the amount of the capital stock paid in, the surplus and undivided profits (the value of the net assets) in order to determine the taxable value to which the rate of tax is to be applied and the consequent amount of tax required to be paid and for that purpose to include in the value of the defendant's total assets the full value of assets consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the said shares of stock described in the statute, the result of which is to discriminate against, to impose a tax upon and to infringe the immunity from state taxation of the said United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and to impose a tax upon the said shares of stock described in the statute. Such construction and application of the statute by the court violates Section 1 of Article IX of the Constitution of Pennsylvania, Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of section 8 of Article I of the Constitution of the United States by discriminating against the defendant and its shareholders by reason of its ownership of the said securities, bonds and shares of stock and by depriving the defendant and its shareholders of their property without due process of law and impairing the power of the Con-

gress of the United States to borrow money on the credit of the United States because under the settlement of the tax and the judgment entered against the defendant the amount of the tax settled against it was increased by reason of its ownership of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and by denying to the defendant and its shareholders the equal pro-
[fol. 205] tection of the laws and discriminating against such non-taxable assets and against it, the defendant, and its shareholders because of its ownership of such assets, the said court having allowed in settlements made in the cases of some trust companies which were subject to the said state statute a deduction from the value of the net assets of the full value of the shares of stock described in the statute, the full value of United States securities and obligations of federal agencies and instrumentalities and national bank shares and shares of stock of Federal Reserve Banks in order to determine the taxable value to which the rate of tax was applied, whereas, under the method of settlement and calculation of the tax applied to the defendant no such "flat" deduction was allowed of the said exempt and non-taxable assets owned by the defendant consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and exempt shares of stock described in the statute. The necessary effect and consequence of such construction of the statute and such method of settlement and calculation of the tax is that no tax is imposed in the case of trust companies the assets of which consist solely of such exempt and non-taxable shares of stock or securities and tax is imposed in cases of trust companies if any of the assets consist of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and settlement is made by allowing "proportionate" instead of "flat" deductions, tax liability being determined not only by the kind of assets owned by each trust company without regard to the value of the shares of stock issued by the trust company and the value of the shareholders' interest in such shares of stock but also by
[fol. 206] whether or not a "flat" or a "proportionate" deduction of the exempt and non-taxable assets is allowed.

Overruled.

36. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed

the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it has been held to impose a tax upon the shares of stock issued by the defendant and other domestic trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the State of Pennsylvania, in such shares and that such tax was imposed by the method of settlement which was applied in the settlement of the tax made against the defendant wherein and whereby the amount of the tax required to be paid is determined by the application of the rate of tax to a value of assets determined by deducting from the value of the total assets of the trust company the amount of its liabilities together with a portion of the value of a class of assets owned by the trust company and described in and expressly exempted by the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of a capital stock tax or tax on shares, and a portion of the value of the non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by the defendant, which portion so to be deducted is such portion of the value of such shares of stock, securities and [fol. 207] bonds as the amount of capital stock paid in, the surplus and undivided profits (the value of the net assets) less the value of assets deducted "flat" (i. e. deducted at their full value) bears to the value of the total assets, less the value of assets deducted "flat" (i.e. deducted at their full value). The result of such method of settlement of the tax made by the said court is to discriminate against and to impose a tax upon the said shares of stock described in and expressly exempted from tax by the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, which tax is determined by the application of the rate of tax to the portion of their value not deducted, and upon all other assets of the trust company not deducted at their full value from the value of the net assets, among which in the case of the defendant were United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and such exempt shares of stock described in and expressly exempted by the statute which were included in the value of the defendant's total assets at the value of $286,994, whereby there was a violation of Section 1 of Article IX of the Constitution of Pennsylvania and

whereby the defendant and its shareholders were deprived of their property without due process of law and had denied to them the equal protection of the laws and the power of Congress of the United States to borrow money on the credit of the United States was impaired in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of Section 8 of Article I of the Constitution of the United States.

Overruled.

[fol. 208] 37. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that under its authority the said court made a tax settlement against the defendant wherein and whereby the amount of tax required to be paid is increased by reason and on account of the defendant's ownership of non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and the amount of the tax is lessened in the cases of all other trust companies in proportion as such other trust companies invested in shares of stock described in the said statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of a capital stock tax or tax on shares, Federal Reserve Bank shares, National Bank shares and other assets held to be deductible "flat", i.e. at their full value, from the value of the net assets in order to determine the taxable value and consequent tax liability, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws, Clause 2 of Section 8 of Article I of the Constitution of the United States by impairing the power of Congress of the United States to borrow money on the credit of the United States and the decisions of the Supreme Court of the United States in the cases of Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass., 279 U. S. 620 [fol. 209] (1929) and Bank of California v. Richardson, 248 U. S. 476 (1919).

Overruled.

38. The learned court erred in that having held that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment April 20, 1936, authorized the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks "flat", i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits which is the value of the net assets, irrespective of whether or not such shares of stock were purchased out of the amount of capital stock paid in, the surplus and undivided profits, and in the tax settlement made against the defendant upon which it based such judgment having made such "flat" deduction of Philadelphia National Bank shares owned by the defendant of the value of $20,202 from the amount of the capital stock paid in the surplus and undivided profits, i. e. the value of the net assets, irrespective of whether or not they were purchased out of the amount of capital stock paid in, the surplus and undivided profits, the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock exempted from tax and described in the statute and owned by the defendant of the value of $286,994 were not in like manner deducted "flat", and as a consequence the said judgment discriminated against the defendant and the said Act of April 25, 1929, Pamphlet Laws 673, which was held to authorize the entry of such judgment discriminates against the defendant and all trust companies which own similar assets and are denied [fol. 210] "flat" deductions from net assets in violation of Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws" and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Sustained and judgment modified. See opinion.

39. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is

unconstitutional and void in that as held by the said court it imposes a tax upon the shares of stock issued by the defendant and other domestic trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the State of Pennsylvania, in such shares, and thereby imposes a tax upon the property of such shareholders of the defendant who were non-residents of the state and upon their property which was situate outside the state in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

Overruled.

John Robert Jones, Attorney for the Defendant.

[fol. 211] IN COURT OF COMMON PLEAS

EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA PLAINTIFF, TO OPINION AND JUDGMENT

Now, this 14th day of May, 1936, the Commonwealth of Pennsylvania excepts to the opinion of the learned trial judge, and judgment directed to be entered by the court in the above entitled case, as follows:

1. The trial judge erred in his conclusion in that part of subdivision one of the "discussion" of his opinion which reads as follows:

"* * * The Supreme Court of the United States held that that conclusion amounted to a discrimination against the stock of the national bank and the United States securities, and that the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, amending the Act of June 13, 1907, P. L. 640, were unconstitutional as 'construed and applied by the Department and the courts' in the settlement in this case."

Overruled.

2. The trial judge erred in his conclusion in that part of subdivision one of the "discussion" of his opinion which reads as follows:

"* * * We do not regard the mandate of the Supreme Court of the United States as definitely determining that these amending acts are unconstitutional and worthless as so much waste paper. We are of opinion that the way is still open to the Pennsylvania courts to limit their application so that they will be free from any discrimination against [fol. 212] United States securities or the shares of national banks."

Overruled.

3. The trial judge erred in his conclusion in that part of subdivision one of the "discussion" of his opinion which reads as follows:

"* * * Our conclusion is that if a full deduction is made for the investment in the shares of national banks and a full deduction is made for the investment of the shares of United States securities, when it is shown that those securities have been purchased out of capital, surplus or undivided profits, and a proportionate deduction is made for United States securities when it is not shown that they have been purchased out of capital, surplus and undivided profits, there would be no unconstitutional application of these amending statutes. * * *"

Overruled.

4. The trial judge erred in his conclusion in that part of subdivision one of his opinion in Commonwealth v. Girard Trust Company, No. 162 Commonwealth Docket, 1933, referred to in this case which reads as follows:

"The question, therefore, is, whether we can construe the amending acts of the Act of 1907 in a way that will sustain their constitutionality which will be not inconsistent with the opinion of the Supreme Court of the United States. * * *"

Overruled.

5. The trial judge erred in his conclusion in that part of subdivision one of his opinion in Commonwealth v. Girard [fol. 213] Trust Company, No. 162 Commonwealth Docket, 1933, referred to in this case which reads as follows:

"* * * In the application of the taxing acts, which we have reviewed, as in the trust company acts, the attempt was made to reach something beyond the grasp of the State. Instead of writing something into the Act, as is contended by the Commonwealth, if we adopt the restricting provisions we are doing exactly what was done in the taxing statutes, namely, applying the language to the extent that the Constitution permits its application. We see no distinction between a case which holds that even though the statute taxes the 'whole capital stock' that portion of it represented by property outside of the State cannot be taxed and a case which holds that the shares of national banks or Federal securities shall not be taxed where the statute says that shares shall not be taxed, insofar as they represent capital stock or shares of other companies which have been taxed or relieved therefrom. * * *"

Overruled.

6. The trial judge erred in his conclusion in that part of subdivision one of his opinion in Commonwealth v. Girard Trust Company, No. 162 Commonwealth Docket, 1933, referred to in this case which reads as follows:

"* * * We are of opinion that the Supreme Court of the United States did not intend to strike down the amending statutes of the Act of 1907, but did intend to hold that as so construed and applied by the Department and the [fol. 214] courts 'in the assessment of a tax for the year 1930,' the act is unconstitutional."

Overruled.

7. The trial judge erred in his conclusion in that part of subdivision one of his opinion in Commonwealth v. Girard Trust Company, No. 162 Commonwealth Docket, 1933, referred to in this case which reads as follows:

"If the amendments of 1923, 1927 and 1929 are unconstitutional in that they allow a discrimination against United States securities, then what we have called the second proviso of the Act of 1907 permits the same discrimination. We cannot escape that conclusion. * * *"

Overruled.

8. The trial judge erred in his conclusion in that part of subdivision one of his opinion in Commonwealth v. Girard Trust Company, No. 162 Commonwealth Docket, 1933, referred to in this case which reads as follows:

"* * * The conclusion is irresistible that if the amendments are wholly void because of this exemption, that portion of the Act of 1907, at least, is also wholly void, insofar as it discriminates because the language does not explicitly exempt United States securities and national banks. It is just as odious in the Act of 1907 as in the amending acts."

Overruled.

9. The trial judge erred in his first conclusion of law which reads as follows:

[fol. 215] "1. In the enactment of the Acts of June 13, 1907, P. L. 640, July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929 P. L. 673, the legislature intended to impose a tax upon the shares of stock of trust companies by adding together the value of the capital, surplus and undivided profits and deducting therefrom the full value of shares of stock of national banks and of Federal reserve banks, and so much thereof as is invested in the shares of stock of other corporations liable to or relieved from a tax on capital stock or shares or in securities issued by the United States Government, its agencies, instrumentalities or dependencies.

Overruled.

10. The trial judge erred in his second conclusion of law which reads as follows:

"2. The acts above referred to must be construed so as to provide that, in computing the taxable value of the shares of stock of a trust company, the deductions expressly provided for by said acts should be made, and that such other deductions should be made as are necessary to avoid discrimination in favor of the classes of securities specified therein and against the shares of stock of national banks or federal reserve banks or against securities issued by the United States Government, its agencies instrumentalities or dependencies, in order that the intention of the legisla-

ture may be carried into effect, and conflict with the statutes and Constitution of the United States may be avoided."

Overruled.

[fol. 216] 11. The trial judge erred in his third conclusion of law which reads as follows:

"3. The acts above referred to, as they have been construed and applied by the taxing officers of the Commonwealth in the settlement of the tax against the appellant, are unconstitutional and void, but those statutes, when so construed and applied as to avoid any discrimination against securities of the United States, its agencies, instrumentalities and dependencies and of national banks, are constitutional."

Overruled.

12. The trial judge erred in his fourth conclusion of law which reads as follows:

"4. In computing the taxable value of the shares of the appellant, the full reported market value of the shares of stock of the Philadelphia National Bank owned by appellant should be deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets."

Overruled.

13. The trial judge erred in his fifth conclusion of law which reads as follows:

"5. By reason of the ownership of the appellant of shares of stock of other corporations which are liable to pay a tax on their capital stock or shares, and of securities issued by the United States Government or its agencies, instrumentalities or dependencies, which securities have not been shown to consist entirely of investments of capital, sur-[fol. 217] plus and undivided profits of the appellant, it is entitled, in computing the taxable value of its shares, to have deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its

assets, a proportion of the value of all such securities, and determined by the following formula:

"(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for a which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

Overruled.

14. The trial judge erred in the computation of the tax for the year 1930, which is as follows:

"Statement

Capital Stock, Surplus and Undivided Profits (book value)		$441,667
Appreciation		25,247
Capital Surplus and Undivided Profits (market value)		$466,914
Less:		
A. Full deduction for shares of National Banks	$20,202	
[fol. 218]		
B. Proportionate deduction for United States Securities and exempt shares of stock $\frac{446,712}{3,735,680} \times 286,994 =$	34,318	54,520
Taxable Value of Capital Stock		$412,394
Tax on same at 5 mills	$2,061.97	
Amount paid on account	570.43	
Balance due the Commonwealth	$1,491.54	
Interest from April 8, 1933	223.73	
Total	$1,715.27	

Attorney General's Commission of 5%	85.76
Total	$1,801.03
Less the costs allowed to the appellant in the mandate of the Supreme Court of the United States	344.00
	$1,457.03"

Now January 22, 1937, this exception is sustained and the statement is revised in our opinion of this date.

15. The trial judge erred in entering the following judgment:

"And now, April 20, 1936, for the reasons given in an opinion hereafter to be filed in this case and in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 C. D. 1933, judgment is hereby entered in [fol. 219] favor of the Commonwealth and against defendant in the sum of $1801.03 less however the allowance of costs to Schuylkill Trust Company of $344 fixed by the mandate of the Supreme Court of the United States, unless exceptions be filed within time limited by law."

Manuel Kraus, Deputy Attorney General for the Commonwealth of Pennsylvania.

IN COURT OF COMMON PLEAS

EXCEPTIONS OVERRULED AND FINAL JUDGMENT

Judgment is entered in our opinion filed January 22, 1937. All the foregoing exceptions other than 14 and 15 are overruled as of this date.

Wm. M. Hargest, P. J.

IN COURT OF COMMON PLEAS

ADDITIONAL EXCEPTIONS OF THE SCHUYLKILL TRUST COMPANY DEFENDANT

And Now, May 18, 1936, the Schuylkill Trust Company, defendant above named, by its attorney, John Robert Jones,

excepts to the findings, the conclusions of law and the judgment directed to be entered by the learned court and [fol. 220] specifies the following exceptions thereto in addition to the exceptions heretofore filed dated May 7, 1936:

40. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 violates the opinion, judgment and mandate of the Supreme Court of the United States entered in the instant case: Schuylkill Trust Company, Appellant, v. The Commonwealth of Pennsylvania, Supreme Court of the United States, No. 3, October Term 1935, November 11, 1935, 296 U. S. 113, wherein and whereby it was adjudged by the Supreme Court of the United States that the judgment of the Supreme Court of Pennsylvania be "reversed with costs; and that the said appellant, Schuylkill Trust Company, recover against the said appellee Three Hundred and Forty-four Dollars for its costs herein expended and have execution therefor."

Overruled.

41. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 violates the opinion, judgment and mandate of the Supreme Court of the United States entered in the instant case: Schuylkill Trust Company, Appellant, v. The Commonwealth of Pennsylvania, Supreme Court of the United States, No. 3, October Term, 1935, November 11, 1935, 296 U. S. 113, wherein and whereby the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, was held unconstitutional and void.

Overruled.

John Robert Jones, Attorney for the Defendant.

[fol. 221] IN COURT OF COMMON PLEAS

OPINION UPON EXCEPTIONS—January 18, 1937

By the COURT:

We have carefully considered the thirty-nine exceptions filed to our opinion and have passed upon each of them

specifically, following the exception itself. Some of them have been overruled, others modified to be consistent with the calculation stated in this opinion.

As to Exception No. 21, we find that there is some error in the figures. Counsel for the Schuylkill Trust Company complains that we have gone outside of the record in order to make this calculation. It is true that we have gone outside of the stipulation but we have not gone outside of the record. The reports and settlements made by the Commonwealth's officers are a part of the record and we resorted to them in order to ascertain the original figures and resort to them in order to ascertain these corrected figures. As to the second item (b), "Proportionate deductions for United States Securities and exempt shares of stock," we now find that the numerator should be $418,650 instead of $446,712. That is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042, total $441,667, which are the book values less the book values of National Bank Shares, $23,017, making $418,650. Instead of the denominator, $3,735,680, used in our original calculation, which is excepted to, the correct denominator should be $2,158,045. In our original calculation we mistakenly used the total of all resources and deducted therefrom the actual value of the National Bank shares. Our formula, however, is that the denominator should consist of the book value [fol. 222] of permanent investments less the book value of those shares, if any, for which a full deduction has been made. It appears that the permanent investments amount to $2,181,062, and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045. Instead of the multiplicand used by us, $286,994, the correct multiplicand is $286,121. This error is accounted for by the fact that the tax value of the Pennsylvania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994.

The appreciation which should be added to the result of the fraction is $35.00, so that the proper fraction under

subdivision (b) of the deductions in the statement is as follows:

$$\frac{418,650}{2,158,045} \times 286,121 + 35 = 55,541, \text{ instead } \$34,318.$$

The total deductions, therefore, amount to $75,743 instead of $54,520, which leaves total taxable value of the capital stock, $391,171 instead of $412,394. The tax on the same at five mills is $1,955.85 instead of $2,061.97.

Applying the figures mentioned, the following is the correct statement:

[fol. 223] **Statement**

Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171
Tax on same at 5 mills		$1,955.85
Amount paid on account		570.43
Balance due Commonwealth		$1,385.42
Interest from April 8, 1933 to April 20, 1936		252.15
Total		$1,637.57
Attorney General's commission		81.88
Total		$1,719.45
Less costs allowed to appellant in the mandate of the Supreme Court of the United States		344.00
Total		$1,375.45

[fol. 224] For convenience and clarity we have calculated the interest up to the date of the filing of our former judgment, April 20, 1936.

Now, January 18, 1937, judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1,375.45.

Wm. M. Hargest, P. J.

IN COURT OF COMMON PLEAS

MODIFIED AND FINAL JUDGMENT—January 22, 1937

By the COURT:

In our opinion filed January 18, 1937, we stated that we had considered thirty-nine exceptions.

We are now advised by counsel for the defendant that there were forty-one exceptions and we find that two additional exceptions were in the files of the Prothonotary's office marked "Filed May 19, 1936," eleven days after the original exceptions were filed. They were not in our hands at the time we wrote the opinion of January 18, 1937. We have overruled the 40th and 41st exceptions, as indicated upon the exceptions themselves.

Counsel for the defendant company apparently is not satisfied with the form of judgment entered January 18, 1937, and we will, therefore, reform the judgment by calculating the interest up to date, instead of to April 20, 1936, as reflected in the judgment of January 18, 1937, and enter it in the form which, we are of opinion, will without doubt become a final judgment.

[fol. 225] Statement

Balance due Commonwealth as directed in our opinion filed January 18, 1937	$1,385.42
Interest from April 8, 1933 to January 22, 1937	314.95
	$1,700.37
Attorney General's commission	85.02
	$1,785.39
Less Costs allowed appellant in the Mandate of the Supreme Court of the United States	344.00
Total	$1,441.39

FINAL JUDGMENT

Now, January 22, 1937, each of the forty-one exceptions is hereby specifically overruled except numbers 21, 22, 23, 29 and 38, which are sustained. The judgment is modified in accordance with and for the reasons given in our Opinion upon exceptions filed January 18, 1937. The judgment entered January 18, 1937, is hereby overruled and final judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1,441.39.

Wm. M. Hargest, P. J.

[fol. 226] IN SUPREME COURT OF PENNSYLVANIA

STATEMENT OF QUESTIONS INVOLVED

(Brief for Appellant)

1. Is the judgment entered by the court below a compliance with the mandate of the Supreme Court of the United States?

Answer of the court below: "Yes."

2. The Supreme Court of the United States upon appeal, federal questions having been raised, having held the Act of April 25, 1929, P. L. 673 unconstitutional, does the court below have the power to amend the statute by allowing additional deductions?

Answer of the court below: "Yes."

3. Is the said Act discriminatory, unconstitutional and void in violation of the federal statutes and the state and federal constitutional provisions recited in the Assignments of Error?

Answer of the court below:

"Yes", as it was written by the legislature;

"No", as it has been construed and applied after the court below has written into the statute, subsequent to and by reason of the decision of the Supreme Court of the United States, words allowing deductions in addition to those written into it by the legislature.

4. Is the judgment entered by the court below construing and applying the said Act judicial legislation in violation of Section 1 of Article II of the State Constitution?

Answer of the court below: "No."

5. Does the taxation of the shares owned by non-residents of the State violate Section 1 of Article IX of the State Constitution and the due process of law and the equal protection of the laws clauses of the 14th Amendment to the Constitution of the United States?

Answer of the court below: "No."

6. Is the tax imposed by the said Act, as it has been construed and applied by the court below in the settlement of tax made by the said court against the appellant and embodied in its judgment, discriminatory, unconstitutional and void in violation of Section 1, Article IX of the State Constitution, the due process of law and the equal protection of the laws clauses of the 14th Amendment to the Constitution of the United States, the federal statutes and the provisions of the State and United States Constitutions recited in the Assignments of Error?

Answer of the court below: "No."

[fols. 227-228] IN SUPREME COURT OF PENNSYLVANIA

COUNTER-STATEMENT OF QUESTIONS INVOLVED

(Brief for Appellee)

1. The Supreme Court of the United States, upon appeal, Federal questions having been raised, having held the amendments of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 583, and April 25, 1929, P. L. 673, to the Act of June 13, 1907, P. L. 640 unconstitutional, should not the court have assessed the tax in accordance with the provisions of the Act of June 13, 1907, P. L. 640?

Answer of the court below: "No".

2. The Supreme Court of the United States, upon appeal, Federal questions having been raised, having held the amendments of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 582, and April 25, 1929, P. L. 673 to the Act of June 13, 1907, P. L. 640, unconstitutional and discriminatory, does the court below have the power to amend the statute by allowing additional deductions?

Answer of the court below: "Yes".

[fol. 229] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 18, 1937

1. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 183a, 184a):

Exception:

"1. The Commonwealth having presented a petition to the court praying the court to enter judgment against the defendant by the imposition of a tax under the first proviso of the Act of June 13, 1907, P. L. 640, without allowing any deductions, upon the ground that such was the mandate of the Supreme Court of the United States in the instant case, and the court upon such petition having granted a rule upon the defendant to show cause why judgment should not be entered in accordance with such prayer and the defendant having demurred to the rule, reserving the right to answer, upon the ground, inter alia, that the court had no jurisdiction to enter judgment for tax against the defendant under authority of the mandate of the Supreme Court of the United States but on the contrary under the mandate of said court it was required that judgment be entered in favor of the defendant with costs, the learned court erred in not sustaining the demurrer of the defendant."

Ruling of the court:

"Overruled. The object of the petition has been accomplished. The Court entered judgment without the necessity of passing on the demurrer."

2. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 184a):

Exception:

"2. The learned court erred in that, not having sustained [fol. 230] the demurrer filed by the defendant and having denied to the defendant the right to answer the petition of the Commonwealth and the rule issued by the court upon such petition, by the judgment which it directed to be

entered against the defendant April 20, 1936 it discriminated against the defendant and its shareholders in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled. The purpose of the petition referred to and the rule granted thereon was simply to get a concise statement of what judgment should be entered in the light of the divergent views of counsel. The defendant was accorded as full a hearing as if no petition had been presented or rule granted."

3. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 184a, 185a):

Exception:

"3. The learned court erred in that having prescribed the formula which it held should be applied to the defendant and which formula required a determination of the book values of the captal, surplus and undivided profits, the book value of the shares of stock for which a full deduction was to be allowed, the book value of 'permanent investments' and the book values of assets which the court held were exempt and non-taxable, it nevertheless entered a judgment which did not comply with such formula and without giving the defendant a hearing and an opportunity to establish the book [fol. 231] values of such assets and 'permanent investments' and to present evidence to show what portion, if any, of the assets which the court held to be exempt and non-taxable and therefore deductible were purchased out of the amount of capital stock paid in, surplus and undivided profits, though such hearing and opportunity were given other trust companies held subject to the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the court directed the entry of judgment against the defendant April 20, 1936, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United

States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled. See answer to Fifth Exception."

4. The learned court below erred in overruling the exception of the defendant, with exception and ruling of the court thereon read as follows (Record 185a):

Exception:

"4. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

'There is no evidence in the instant case that any of the United States securities were purchased out of capital, surplus or undivided profits.'"

Ruling of the court:

"Overruled."

5. The learned court below erred in overruling the ex- [fol. 232] ception of the defendant, which exception and ruling of the court thereon read as follows (Record 186a):

Exception:

"5. The learned court erred in that it made a tax settlement against the defendant by the application of a method of settlement in accordance with which and upon which it directed the entry of judgment against the defendant April 20, 1936 without the evidence and the findings of facts essential to the application of such method of tax settlement and the entry of such judgment, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled. This case was originally heard by this Court de novo with full opportunity to present any facts affecting

the amount of tax. When the case was returned under the mandate of the Supreme Court of the United States it was to enter judgment on the record, not to open up the case to make a new record. The formula to be applied was settled in the case of Commonwealth vs. Provident Trust Co., 40 Dau. 146; 41 Dau. 1; 319 Pa. 385."

6. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 186a):

Exception:

"6. The learned court erred in its conclusion in that por- [fol. 233] tion of its opinion which reads as follows:

'The case, however, was argued on the merits, and inasmuch as we have the contentions of the parties now submitted to us it is not necessary to determine the matter upon the petition and rule.' "

Ruling of the court:

"Overruled."

7. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 187a):

Exception:

"7. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

"The questions involved were: 1. What deduction should be made because of the ownership by the defendant of the stock of the Philadelphia National Bank and of United States securities?

2. Is the defendant entitled to have deducted from the settlement the taxable value of all its shares which are held by persons or corporations resident and domiciled in other states of the United States?' "

Ruling of the court:

"Overruled."

8. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 187a):

Exception:

"8. The learned court erred in its conclusion in that por-
[fol. 234] tion of its opinion which reads as follows:

'We are bound to place such a construction upon a statute as will sustain its constitutionality, if it is susceptible of such construction. We do not regard the mandate of the Supreme Court of the United States as definitely determining that these amending acts are unconstitutional and worthless as so much waste paper. We are of opinion that the way is still open to the Pennsylvania courts to limit their application so that they will be free from any discrimination against United States securities or the shares of national banks.'"

Ruling of the court:

"Overruled."

9. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 188a):

Exception:

"9. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

'Our conclusion is that if a full deduction is made for the investment in the shares of national banks and a full deduction is made for the investment of the shares of United States securities, when it is shown that those securities have been purchased out of capital, surplus or undivided profits, and a proportionate deduction is made for United States securities when it is not shown that they have been purchased out of capital, surplus and undivided profits, there would be no unconstitutional application of these amending statutes.'"

[fol. 235] Ruling of the court:

"Overruled."

10. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 188a, 189a):

Exception:

"10. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

'* * *, in ascertaining the taxable value of the shares of trust companies, the following formula should be applied:

'1. The full market value of all securities must be deducted, if they be wholly investments of capital, surplus and undivided profits. Otherwise a proportionate deduction is to be made.

'2. Where a proportionate deduction is to be made it should be according to the following:

'(a) The numerator to consist of the capital, surplus and undivided profits determined by the book values, less the book value of those shares, if any, for which a full deduction has been made.

'(b) The denominator to consist of the book value of permanent investments, less the book value of those shares, if any, for which the full deduction has been made.

'(c) The multiplicand to be the book value of the shares which are apportioned.

'(d) The result thus obtained to be increased or decreased by the amount of appreciation or depreciation of the shares which are apportioned.

'We see no reason for departing from this formula in the instant case. It must be amplified by allowing a full deduction for national bank shares.'"

[fol. 236] Ruling of the court:

"Overruled."

11. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 189a, 190a):

Exception:

"11. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

'2. The defendant contends that the taxable value of all its shares which are held by persons or corporations resident or domiciled in other states of the United States should be deducted in arriving at the settlement.

'Inasmuch as we have decided in the case of Commonwealth v. Provident Trust Company, supra, and in this case that it is not entitled to such deduction, the tax being a tax on shares, and both of those cases having been affirmed by the Supreme Court of Pennsylvania, and while the question was raised in the Supreme Court of the United States it was not passed upon, we are still bound to follow the decision of the Supreme Court of Pennsylvania and we, therefore, concluded that defendant is not entitled to such deductions.' ''

Ruling of the court:

''Overruled.''

12. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 190a):

[fol. 237] Exception:

''12. The Conclusions of Law found by the court and numbered 1, 2, 3, 4, 5, 6, 7 and 8, respectively, being interrelated and embodying the formula and method of settlement which the court holds to be the basis of the judgment which it directed to be entered against the defendant April 20, 1936, are erroneous and in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States and are accordingly excepted to as a whole and separately.''

Ruling of the court:

''Overruled.''

13. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 190a, 191a):

Exception:

''13. The learned court erred in its 1st Conclusion of Law which reads as follows:

'1. In the enactment of the Acts of June 13, 1907, P. L. 640, July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, the legislature intended to impose a tax upon the shares of stock of trust companies by adding

together the value of the capital, surplus and undivided profits and deducting therefrom the full value of shares of stock of national banks and of Federal reserve banks, and so much thereof as is invested in the shares of stock of other corporations liable to or relieved from a tax on capital stock or shares or in securities issued by the United States Government, its agencies, instrumentalities or dependencies.' "

[fol. 238] Ruling of the court:

"Overruled."

14. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 191a):

Exception:

"14. The learned court erred in its 2nd Conclusion of Law which reads as follows:

'2. The acts above referred to must be construed so as to provide that, in computing the taxable value of the shares of stock of a trust company, the deductions expressly provided for by said acts should be made, and that such other deductions should be made as are necessary to avoid discrimination in favor of the classes of securities specified therein and against the shares of stock of national banks or federal reserve banks or against securities issued by the United States Government, its agencies, instrumentalities or dependencies, in order that the intention of the legislature may be carried into effect, and conflict with the statutes and Constitution of the United States may be avoided.' "

Ruling of the court:

"Overruled."

15. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 191a, 192a):

Exception:

"15. The learned court, being without legislative power [fol. 239] and being bound by the decision of the Supreme Court of Pennsylvania in the instant case filed June 30,

1934 (315 Pa. 429), erred in so much of its 3rd Conclusion of Law as reads as follows:

'3. The acts above referred to, * * *, when so construed and applied as to avoid any discrimination against securities of the United States, its agencies, instrumentalities and dependencies and of national banks, are constitutional.' "

Ruling of the court:

"Overruled."

16. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 192a):

Exception:

"16. The learned court, being without legislative power and being bound by the decision of the Supreme Court of Pennsylvania in the instant case filed June 30, 1934 (315 Pa. 429), erred in its 4th Conclusion of Law which reads as follows:

'4. In computing the taxable value of the shares of the appellant, the full reported market value of the shares of stock of the Philadelphia National Bank owned by appellant should be deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets.' "

Ruling of the court:

"Overruled."

17. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the [fol. 240] court thereon read as follows (Record 192a, 193a):

Exception:

"17. The learned court erred in its 5th Conclusion of Law which reads as follows:

'5. By reason of the ownership of the appellant of shares of stock of other corporations which are liable to pay a tax

on their capital stock or shares, and of securities issued by the United States Government or its agencies, instrumentalities or dependencies, which securities have not been shown to consist entirely of investments of capital, surplus and undivided profits of the appellant, it is entitled, in computing the taxable value of its shares, to have deducted from its capital, surplus and undivided profits, as the same are determined from the market value of its assets, a proportion of the value of all such securities, as determined by the following formula:

'(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned.' ''

Ruling of the court:

"Overruled."

18. The learned court below erred in overruling the ex-
[fol. 241] ception of the defendant, which exception and ruling of the court thereon read as follows (Record 193a):

Exception:

"18. The learned court erred in its 6th Conclusion of Law which reads as follows:

'6. The situs of the shares of stock of a trust company for the purpose of taxation is the domicile of the company.' ''

Ruling of the court:

"Overruled."

19. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 193a):

Exception:

"19. The learned court erred in its 7th Conclusion of Law which reads as follows:

'7. The appellant is not entitled to have deducted in the settlement of the taxable value of its shares those shares which are held by persons or corporations resident or domiciled outside of the State of Pennsylvania.' "

Ruling of the court:

"Overruled."

20. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 194a):

[fol. 242] Exception:

"20. The learned court erred in its 8th Conclusion of Law which reads as follows:

'8. Judgment must be entered in favor of the Commonwealth and against the defendant.' "

Ruling of the court:

"Overruled."

21. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 194a, 195a):

Exception:

"21. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

'From what we have said in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket 1933, we conclude that for the purpose of taxation the following is a correct

'Statement

'Capital Stock, Surplus and Undivided Profits (book value)		$441,667
Appreciation		25,247
Capital, Surplus and Undivided Profits (market value)		$466,914
Less:		
A. Full deduction for shares of National Banks	$20,202	
B. Proportionate deduction for United States Securities and [fol. 243] exempt shares of stock, $\frac{446,712}{3,735,680} \times 286,994 =$	34,318	54,520
Taxable Value of Capital Stock		$412,394
Tax on same at 5 mills	$2,061.97	
Amount paid on account	570.43	
Balance due the Commonwealth	1,491.54	
Interest from April 8, 1933	228.73	
Total	1,715.27	
Attorney General's Commission of 5%	85.76	
Total	$1,801.03	
Less the costs allowed to the appellant in the mandate of the Supreme Court of the United States	344.00	
	$1,457.03' "	

Ruling of the court:

"Sustained and judgment modified. See opinion."

22. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 195a):

Exception:

"22. The learned court erred in its conclusion in that portion of its opinion which reads as follows:

[fol. 244] 'For the reasons given in this opinion and in the opinion in the case of Commonwealth of Pennsylvania v. Girard Trust Company, No. 162 Commonwealth Docket 1933, filed herewith, we directed judgment to be entered as above indicated April 20, 1936.

'Wm. M. Hargest, P. J.'"

Ruling of the court:

"Sustained and Judgment modified. See opinion."

23. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 195a, 196a):

Exception:

"23. The learned court erred in directing the following judgment to be entered:

'And now, April 20, 1936, for the reasons given in an opinion hereafter to be filed in this case and in the case of Commonwealth of Pennsylvania v. Girard Trust Co. No. 162 Commonwealth Docket, 1933, judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1801.03, less, however, the allowance of costs to the said Schuylkill Trust Company of $344 fixed by the mandate of the Supreme Court of the United States, unless exceptions be filed within the time limited by law.

'Wm. M. Hargest, P. J.'"

Ruling of the court:

"Sustained and judgment modified. See opinion."

[fol. 245] 24. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 196a):

Exception.

"24. The learned court erred in not directing judgment to be entered in favor of the Schuylkill Trust Company, the defendant, and against the Commonwealth of Pennsylvania, the plaintiff, together with costs."

Ruling of the court:

"Overruled."

25. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 196a):

Exception:

"25. The learned court erred in that it held that a method of settlement described in its opinion as the method of settlement which was applied by it 'In the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385,' is a method of settlement which is consistent with the opinion of the Supreme Court of the United States and complies with its mandate in the instant case."

Ruling of the court:

"Overruled."

26. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 197a):

[fol. 246] Exception:

"26. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 was determined in amount by a method of settlement which differs from the method of settlement which in its opinion it declared to be the proper method of settlement and which it described in its opinion as the method of settlement applied in the case of Commonwealth v. Provident Trust Co., 40 Dauph. 146, 41 Dauph. 1, affirmed in 319 Pa. 385 (1935)."

Ruling of the court:

"Overruled."

27. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 197a):

Exception:

"27. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 was determined in amount by a method of settlement which differs from the method of settlement which was applied to other trust companies for the same and other tax years under authority of the said Act of April 25, 1929, Pamphlet Laws 673, and in the cases of the Provident Trust Company, 40 Dauph. 146, 41 Dauph. 1, and the Girard Trust Company, Court of Common Pleas of Dauphin County, No. 162, Commonwealth Docket, 1933, to both of which the court refers, thereby discriminating against the defendant and its shareholders in violation of Section 1 of Article IX of the constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their [fol. 247] property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

28. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 198a):

Exception:

"28. The learned court erred in that its construction and application of the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, by the judgment directed to be entered against the defendant April 20, 1936 constitute judicial legislation amending the statute by writing into it a provision granting additional exemptions from taxation in violation of Section 1 of Article II of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

29. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 198a):

Exception:

"29. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, [fol. 248] 1936 violates the opinion, judgment and mandate of the Supreme Court of the United States, (November 11, 1935) (296 U. S. 113)."

Ruling of the court:

"Sustained and judgment modified. See opinion."

30. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 198a):

Exception:

"30. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void, being in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

31. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 199a):

Exception:

"31. The learned court erred in that the Act of Assembly [fol. 249] of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it

directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void, being in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States."

Ruling of the court:

"Overruled."

32. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 199a):

Exception:

"32. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax upon and discriminates against United States securities owned by the defendant in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States, Section 3701 Revised Statutes of the United States, 31 U. S. C. Sec. 742, which exempts obligations of the United States from state taxation and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

[fol. 250] Ruling of the court:

"Overruled."

33. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 199a, 200a):

Exception:

"33. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax

upon and discriminates against Philippine Islands bonds owned by the defendant in violation of the provisions of the Act of Congress of the United States of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11, Act of Congress of the United States of July 21, 1921, c. 51, 42 Stat. 145, and Act of the Philippine Legislature Number 2949 approved February 5, 1921, Act of Congress of February 6, 1905, c. 453, 33 Stat. part 1, 689, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

34. The learned court below erred in overruling the ex-
[fol. 251] ception of the defendant, which exception and ruling of the court thereon read as follows (Record 200a, 201a):

Exception:

"34. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under the authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it imposes a tax upon and discriminates against Joint Stock Land Bank bonds owned by the defendant in violation of the provisions of 'The Federal Farm Loan Act' of the United States Congress of July 17, 1916, c. 245, 39 Stat. 360, Sec. 16, Sec. 26, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

35. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 201a-204a):

Exception:

"35. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it di- [fol. 252] rected the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it has been held to authorize the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks 'flat', i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits which is the value of the net assets, irrespective of whether or not such shares of stock were purchased out of the capital stock paid in, the surplus and undivided profits, and to authorize the apportionment of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a class of assets owned by the defendant and described in the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares, between the amount of its capital stock paid in, the surplus and undivided profits (the value of the net assets) and the amount of its liabilities, for the purpose of determining what portion of the value of the said United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and shares of stock is to be deducted from the amount of the capital stock paid in, the surplus and undivided profits (the value of the net assets) in order to determine the taxable value to which the rate of tax is to be applied and the consequent amount of tax required to be paid and for that purpose to include in the value of the defendant's total assets the full value of assets consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the said shares of stock described in the statute, the result of which is to discriminate against, to impose a tax upon and to infringe the immunity from state taxation of the said United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and to impose a tax upon the said shares of stock described in the statute. Such construction and [fol. 253] application of the statute by the court violates

Section 1 of Article IX of the Constitution of Pennsylvania, Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of Section 8 of Article I of the Constitution of the United States by discriminating against the defendant and its shareholders by reason of its ownership of the said securities, bonds and shares of stock and by depriving the defendant and its shareholders of their property without due process of law and impairing the power of the Congress of the United States to borrow money on the credit of the United States because under the settlement of the tax and the judgment entered against the defendant the amount of the tax settled against it was increased by reason of its ownership of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and by denying to the defendant and its shareholders the equal protection of the laws and discriminating against such non-taxable assets and against it, the defendant, and its shareholders because of its ownership of such assets, the said court having allowed in settlements made in the cases of some trust companies which were subject to the said state statute a deduction from the value of the net assets of the full value of the shares of stock described in the statute, the full value of United States securities and obligations of federal agencies and instrumentalities and national bank shares and shares of stock of Federal Reserve Banks in order to determine the taxable value to which the rate of tax was applied, whereas, under the method of settlement and calculation of the tax applied to the defendant no such 'flat' deduction was allowed of the said exempt and non-taxable assets owned by the defendant consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and exempt shares of stock described in the statute. The necessary effect and consequence of such construction of the statute and such method of settlement and calcula-
[fol. 254] tion of the tax is that no tax is imposed in the case of trust companies the assets of which consist solely of such exempt and non-taxable shares of stock or securities and tax is imposed in cases of trust companies if any of the assets consist of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and settlement is made by allowing 'proportionate' instead of 'flat'

deductions, tax liability being determined not only by the kind of assets owned by each trust company without regard to the value of the shares of stock issued by the trust company and the value of the shareholders' interest in such shares of stock but also by whether or not a 'flat' or a 'proportionate' deduction of the exempt and non-taxable assets is allowed."

Ruling of the court:

"Overruled."

36. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 204a, 205a):

Exception:

"36. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that it has been held to impose a tax upon the shares of stock issued by the defendant and other domestic trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the State of Pennsylvania, in such shares and that such tax was imposed by the method of settlement which [fol. 255] was applied in the settlement of the tax made against the defendant wherein and whereby the amount of the tax required to be paid is determined by the application of the rate of tax to a value of assets determined by deducting from the value of the total assets of the trust company the amount of its liabilities together with a portion of the value of a class of assets owned by the trust company and described in and expressly exempted by the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of a capital stock tax or tax on shares, and a portion of the value of the non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by the defendant, which portion so to be deducted is such portion of the value of such shares of stock, securities and bonds as the amount of capital stock paid in, the surplus and undivided profits (the value of the net assets) less the value of assets deducted 'flat' (i.e. deducted at their

full value) bears to the value of the total assets, less the value of assets deducted 'flat' (i. e. deducted at their full value). The result of such method of settlement of the tax made by the said court is to discriminate against and to impose a tax upon the said shares of stock described in and expressly exempted from tax by the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, which tax is determined by the application of the rate of tax to the portion of their value not deducted, and upon all other assets of the trust company not deducted at their full value from the value of the net assets, among which in the case of the defendant were United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and such exempt shares of stock described in and expressly exempted by the statute which were included in the value of the defendant's total assets at the value of $286,994, whereby there was a violation of Section 1 of Article IX of the Constitution of Pennsylvania [fol. 256] and whereby the defendant and its shareholders were deprived of their property without due process of law and had denied to them the equal protection of the laws and the power of Congress of the United States to borrow money on the credit of the United States was impaired in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of Section 8 of Article I of the Constitution of the United States."

Ruling of the court:

"Overruled."

37. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 206a, 207a):

Exception:

"37. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that under its authority the said court made a tax settlement against the defendant wherein and whereby the amount of tax required to be paid is increased by reason and on account of the defendant's ownership of non-taxable United States securities, Philip-

pine Islands bonds and Joint Stock Land Bank bonds and the amount of the tax is lessened in the cases of all other trust companies in proportion as such other trust companies invested in shares of stock described in the said statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of a capital stock tax or tax on shares, Federal Re-
[fol. 257] serve Bank shares, National Bank shares and other assets held to be deductible 'flat', i. e. at their full value, from the net assets in order to determine the taxable value and consequent tax liability, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws, Clause 2 of Section 8 of Article I of the Constitution of the United States by impairing the power of Congress of the United States to borrow money on the credit of the United States and the decisions of the Supreme Court of the United States in the cases of Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass., 279 U. S. 620 (1929) and Bank of California v. Richardson, 248 U. S. 476 (1919)."

Ruling of the court:

"Overruled."

38. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 207a, 208a):

Exception:

"38. The learned court erred in that having held that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment April 20, 1936, authorized the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks 'flat', i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits which is the value of the net assets, irrespective of whether or not such shares of stock were purchased out of the amount of capital
[fol. 258] stock paid in, the surplus and undivided profits, and in the tax settlement made against the defendant upon which it based such judgment having made such 'flat' deduction of Philadelphia National Bank shares owned by

the defendant of the value of $20,202. from the amount of the capital stock paid in, the surplus and undivided profits, i. e. the value of the net assets, irrespective of whether or not they were purchased out of the amount of capital stock paid in, the surplus and undivided profits, the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock exempted from tax and described in the statute and owned by the defendant of the value of $286,994. were not in like manner deducted 'flat,' and as a consequence the said judgment discriminated against the defendant and the said Act of April 25, 1929, Pamphlet Laws 673, which was held to authorize the entry of such judgment discriminates against the defendant and all trust companies which own similar assets and are denied 'flat' deductions from net assets in violation of Section 1 of Article IX of the Constitution of Pennsylvania which requires that 'All taxes shall be uniform upon the same class of subject, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws' and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Sustained and judgment modified. See opinion."

39. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the [fol. 259] court thereon read as follows (Record 208a):

Exception:

"39. The learned court erred in that the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it directed the entry of judgment against the defendant April 20, 1936, is unconstitutional and void in that as held by the said court it imposes a tax upon the shares of stock issued by the defendant and other domestic trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the State of Pennsylvania, in such shares, and thereby imposes a tax upon the property of such shareholders of the defendant who were non-residents of the state

and upon their property which was situate outside the state in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the defendant and its shareholders of their property without due process of law and denying to them the equal protection of the laws."

Ruling of the court:

"Overruled."

40. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 218a):

Exception:

"40. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936 violates the opinion, judgment and mandate of the Supreme [fol. 260] Court of the United States entered in the instant case: Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, Supreme Court of the United States, No. 3, October Term, 1935, November 11, 1935, 296 U. S. 113, wherein and whereby it was adjudged by the Supreme Court of the United States that the judgment of the Supreme Court of Pennsylvania be 'reversed with costs; and that the said appellant, Schuylkill Trust Company, recover against the said appellee Three Hundred and Forty-four Dollars for its costs herein expended and have execution therefor.'"

Ruling of the court:

"Overruled."

41. The learned court below erred in overruling the exception of the defendant, which exception and ruling of the court thereon read as follows (Record 218a):

Exception:

"41. The learned court erred in that the judgment which it directed to be entered against the defendant April 20, 1936, violates the opinion, judgment and mandate of the Supreme Court of the United States entered in the instant case: Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, Supreme Court of the United States,

No. 3, October Term, 1935, November 11, 1935, 296 U. S. 113, wherein and whereby the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, was held unconstitutional and void."

Ruling of the court:

"Overruled."

[fol. 261] 42. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 219a):

"The reports and settlements made by the Commonwealth's officers are a part of the record * * *."

43. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 219a):

"As to the second item (b), 'Proportionate deductions for United States Securities and exempt shares of stock', we now find that the numerator should be $418,650 instead of $446,712. That is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042, total $441,667, which are the book values less the book values of National Bank shares, $23,017, making $418,650."

44. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 219a):

"Instead of the denominator, $3,735,680, used in our original calculation, which is excepted to, the correct denominator should be $2,158,045."

45. The learned court below in its conclusion in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 219a, 220a):

"* * * the denominators should consist of the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made."

[fol. 262] 46. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 220a):

"It appears that the permanent investments amount to $2,181,062, and after deducting the book value of the

National Bank shares, $23,017, we get the denominator, $2,158,045."

47. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 220a):

"Instead of the multiplicand used by us, $286,994, the correct multiplicand is $286,121."

48. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 220a):

"• • • the proper fraction under sub-division (b) of the deductions in the statement is as follows:

$$\frac{418,650}{2,158,045} \times 286,121 + 35 = 55,541, \text{ instead of } \$34,318."$$

49. The learned court below erred in its finding in that portion of its "Opinion Upon Exceptions" filed January 18, 1937 which reads as follows (Record 220a):

"The total deductions, therefore, amount to $75,743 instead of $54,520, which leaves total taxable value of the capital stock, $391,171 instead of $412,394. The tax on the same at five mills is $1,955.85 instead of $2,061.97."

50. The learned court below erred in its finding and conclusion in that portion of its "Opinion Upon Exceptions" [fol. 263] filed January 18, 1937 which reads as follows (Record 220a, 221a):

"Applying the figures mentioned, the following is the correct statement:

"Statement

"Capital stock, surplus and undivided profits (book value)		$441,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	$55,541	75,743
Total value of capital stock		$391,171
Tax on same at 5 mills		$1,955.85
Amount paid on account		570.43
Balance due Commonwealth,		$1,385.42
Interest from April 8, 1933 to April 20, 1936		252.15
Total		$1,637.57
Attorney General's commission		81.88
Total		$1,719.45
Less costs allowed to appellant in the mandate of the Supreme Court of the United States		344.00
Total		$1,375.45"

[fol. 264] 51. The learned court below erred in directing the entry of the judgment which reads as follows (Record 222a):

"Now, January 18, 1937, judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1,375.45.

Wm. M. Hargest, P. J."

52. The learned court below erred in its finding and conclusion in that portion of its opinion entitled "Modified

Judgment'' filed January 22, 1937 under the heading ''Statement'' which reads as follows (Record 223a):

''Statement

''Balance due Commonwealth as directed in our opinion filed January 18, 1937	$1,385.42
Interest from April 8, 1933 to January 22, 1937	314.95
	$1,700.37
Attorney General's commission	85.02
	$1,785.39
Less Costs allowed appellant in the Mandate of the Supreme Court of the United States	344.00
Total	$1,441.39''

53. The learned court below erred in entering its final judgment which reads as follows (Record 223a):

''Final Judgment''

''Now, January 22, 1937, each of the forty-one exceptions is hereby specifically overruled except numbers 21, 22, 23, 29 and 38, which are sustained. The judgment is modified in accordance with and for the reasons given in our Opinion upon exceptions filed January 18, 1937. The judgment entered January 18, 1937, is hereby overruled and final judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant in the sum of $1,441.39.

Wm. M. Hargest, P. J.''

[fol. 265] [File endorsement omitted]

[fol. 266] IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, MAY TERM, 1937

Nos. 35, 36

COMMONWEALTH OF PENNSYLVANIA

v.

SCHUYLKILL TRUST COMPANY, Appellant

COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

SCHUYLKILL TRUST COMPANY

Appeals from Final Judgment of Court of Common Pleas of Dauphin County, in No. 61, Commonwealth Docket, 1933

OPINION OF THE COURT—Filed June 25, 1937

STERN, J.:

From a judgment of the Court of Common Pleas of Dauphin County fixing the settlement of the tax on shares of capital stock of defendant, a trust company, for the year 1930, both Commonwealth and defendant have appealed. The controversy was previously in this court (Commonwealth v. Schuylkill Trust Company, 315 Pa. 429) but on two of the questions involved an appeal was taken by defendant to the Supreme Court of the United States.[1] They were: (1) Whether a deduction from the appraisement on which the tax was *assessed should be made* for the value of shares of national bank stock held by defendant; (2) Whether a discrimination against United States government securities arose from the fact that their value was not deducted from the appraisement, although deductions were made for investments in "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares," as provided by the Acts of July 11, 1923,

[1] The appeal was also as to the right of the Commonwealth to tax shares of stock of defendant owned by residents of states other than Pennsylvania, but the Supreme Court did not pass upon this question. It was decided—contrary to defendant's contention—in 315 Pa. 429.

P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, which amended the original act of June 13, 1907, P. L. 640.[2]

[fol. 267]. As to the first question, the Supreme Court held (Schuylkill Trust Company v. Pennsylvania, 296 U. S. 113) that the national bank stock having been taxed to the bank's shareholders by the Act of July 15, 1897, P. L. 292, as amended by the Act of April 25, 1929, P. L. 677, it could not again be taxed to defendant's stockholders: R. S. § 5219, 12 U. S. C. A. § 548; Bank of California v. Richardson, 248 U. S. 476. On this point there can be no further controversy.

As to the second question, the Supreme Court stated that "The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government."[3] But because of the statutory deductions of the value of stocks already taxed or relieved from taxation by the state, no similar deduction being provided for in the case of United States securities, it "is impossible to avoid the conclusion" that the law works a discrimination against such securities. The court therefore remanded the cause "for further proceedings not inconsistent with this opinion." Mr. Justice Cardozo filed a dissenting opinion, concurred in by Mr. Justice Brandeis and Mr. Justice Stone, in which he said that the Pennsylvania statutes were not passed as acts of "'unfriendly discrimination' . . . against the national securities, nor . . . in aid of classes of investments with which the national securities are in substantial competition. . . . Assuming such a discrimination, I do not under-

[2] There were further amendments to the Act of 1907 by the Acts of May 31, 1933, P. L. 1132, and July 28, 1936, Spec. Sess. P. L. 73, which finally eliminated all deductions from the amount of capital stock paid in, surplus and undistributed profits, in ascertaining the value of the shares for taxation.

[3] See Van Allen v. The Assessors, 3 Wall. 573; Cleveland Trust Co. v. Lander, 184 U. S. 111; Des Moines National Bank v. Fairweather, 263 U. S. 103, 112; Educational Films Corporation v. Ward, 282 U. S. 379, 390.

stand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it. * * * If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, [fol. 268] even at the price of enlarging the deductions. Iowa Des Moines Bank v. Bennett, 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of lessened. The choice between these curative measures must be made by the state court."

The case being again before the Common Pleas of Dauphin County, that court rendered opinions, through President Judge Hargest (42 Dauphin Co. Rep. 317; 43 Dauphin Co. Rep. 258 and 261, and, in the companion case of Commonwealth v. Girard Trust Company, 42 Dauphin Co. Rep. 299), which are so comprehensive and self-vindicating that what here follows is more by way of restatement than of profitable addition. The court held that the effect of the United States Supreme Court decision was not wholly to invalidate the amendatory acts of 1923, 1927 and 1929, but merely to require, in the appraisal of the shares of stock of trust companies, that securities of the United States government be put upon the same favorable basis, by way of deduction from the tax valuation, as the investments eliminated under the specific provisions of those acts.

There are three possible solutions of the problem left open by the decision of the Supreme Court: one, urged by the Commonwealth on its appeal; a second, urged by defendant on its appeal; the third, adopted by the court below.

1. The contention of the Commonwealth is that the Supreme Court held the amendatory acts of 1923, 1927 and 1929 unconstitutional, leaving the original act of 1907 unaffected,[4] and that the tax settlement of defendant's shares of stock should therefore be made in accordance with that [fol. 269] act, which allowed no deductions whatever. It maintains that the proviso in the Act of 1907 which gave

[4] Eberle v. Michigan, 232 U. S. 700, 705; Truax v. Corrigan, 257 U. S. 312, 342; Davis v. Wallace, 257 U. S. 478, 485.

permission to a trust company paying the tax before the first of March to deduct investments in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, was merely the allowance of a discount for prompt payment, but that even if it were held to be unconstitutional as involving the same discrimination against United States securities as that brought about by the amendatory acts, its invalidity would not affect the remainder of the Act of 1907. Thus it is the Commonwealth's position that the discrimination should be remedied, not by allowing a deduction of the United States securities, but by eliminating the deductions granted by the amendatory acts.

2. Defendant agrees with the Commonwealth that the amendatory acts were completely nullified by the Supreme Court decision, but argues that the "discount" proviso of the Act of 1907 is also invalid, and that it cannot be amputated without destroying the act itself, severability being impossible because of the interdependence of the proviso and the body of the act.[5] Defendant further argues that the Act of 1907 is invalid even apart from the proviso, because it fails to exclude from the tax appraisement the value of the shares of stock of national banks, and therefore, on the Commonwealth's theory that such an exclusion cannot be "judicially" created, the Act of 1907 is incapable of constitutional application. The result would be that no statute would remain under which defendant's stock could be taxed.

3. The court below approved of neither of these extreme positions, but adopted the intermediate course of holding that, since the Supreme Court had decided that the amendments to the Act of 1907, as interpreted by the state courts, imposed an unconstitutional tax upon securities of the United States government, the remedy was, not to declare [fol. 270] these statutes invalid, but to limit their application by implying a legislative intent to exclude such securities. The court pointed out that this method of interpretative adaptation of a statute to constitutional requirements, far from being unique, has been regularly employed, and illustrations of its use are abundantly to be found in the

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[5] Booth & Flinn, Ltd. v. Miller, 237 Pa. 297, 309; Commonwealth v. Humphrey, 288 Pa. 280, 290.

decisions construing various other tax statutes.[6] For example, if an act imposes a tax upon various articles or subjects, and it cannot constitutionally be sustained as to one or more of them, the statute is not thereby invalidated as a whole, unless, of course, it clearly appears that the legislature would not have passed the act as thus reduced in scope. This is not "judicial legislation," nor does it involve a "rewriting" of statutory enactments; it adds nothing to the legislative provisions; it merely enforces them to the extent possible in view of constitutional limitations.[7] "A presumption of much importance in this country, * * * is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied, by a contrary construction": Endlich, Interpretation of Statutes, § 178, "It is a safe and wholesome rule * * * to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply": Idem, § 179.

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[6] For example, in the case of the capital stock tax, Commonwealth v. Standard Oil Co., 101 Pa. 119, 146; Commonwealth v. Lackawanna Iron & Coal Co., 129 Pa. 346, 356; Commonwealth v. Westinghouse Electric & Manufacturing Co., 151 Pa. 265; Commonwealth v. Westinghouse Air Brake Co., 251 Pa. 12. In the case of the corporate loans tax, Pittsburgh, Fort Wayne & Chicago Railway Co. v. Commonwealth, 66 Pa. 73; Commonwealth v. Barrett Manufacturing Co., 246 Pa. 301. In the case of the tonnage tax, In re State Freight Tax, 15 Wall. 232, 282. In the case of the inheritance tax, Bittinger's Estate, 129 Pa. 338, 345; Frick v. Pennsylvania, 268 U. S. 473. In the case of the mercantile license tax, Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

[7] In Fidelity & Guaranty Fire Corporation v. Leser, 190 Atl. 830, the Court of Appeals of Maryland held, in construing a statute of that state similar to the one here involved, that the deductions prescribed in the statute could not be allowed in view of the Supreme Court decision in the present case. In the Maryland act, however, there was a clause that "if any exemption or exception from any tax is held invalid, the tax shall apply without such exemption or exception."

[fol. 271] We are of opinion, therefore, that the decision of the court below constitutes the proper solution of the problem involved.

As to the method or formula employed to determine what part of the non-taxable investments are included within the capital stock structure, there is no serious complaint made by defendant, nor could there be in view of the previous decisions of this court. In Commonwealth v. Hazelwood Savings and Trust Co., 271 Pa. 375, it was held that if a trust company purchases the non-taxable securities out of its paid-in capital stock, surplus and undivided profits, the entire value thereof should be deducted, but if out of its other assets, no part of their value is deductible, and that the burden is upon the company to prove that it did purchase the securities out of its capital stock account, and, if it fails to establish that fact, the Commonwealth may, perhaps, refuse to allow any deduction whatever; if, therefore, instead of doing this, the Commonwealth adopts the more equitable course of apportioning the value of the non-taxable securities between the two funds, the trust company has no just cause for complaint. The same method of apportionment was approved by this court when the present case was previously before it: Commonwealth v. Schuylkill Trust Co., 315 Pa. 429, and again in Commonwealth v. Provident Trust Co. of Philadelphia, 319 Pa. 385.[8]

The judgment is affirmed.

[fol. 272] [File endorsement omitted.]

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[8] The formula is as follows: The numerator consists of the capital paid in, surplus, and undivided profits, determined by the book values, less the book value of those investments, if any, for which a full deduction has been made. The denominator consists of the book values of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made. The multiplicand is the book value of the shares and securities which are to be apportioned. The result thus obtained is increased or diminished by the amount of appreciation or depreciation in the shares and securities apportioned.

[fol. 273] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal from Judgment of the Supreme Court of Pennsylvania, Middle District, as of May Term, 1937, No. 35, Assignments of Error, and Prayer for Reversal— Filed August 31, 1937

PETITION FOR APPEAL

To the Honorable the Justices of the Supreme Court of the United States:

Considering itself aggrieved by the final decision of the Supreme Court of the State of Pennsylvania in the above entitled cause, the appellant therein, Schuylkill Trust Company, a corporation incorporated under the laws of the State of Pennsylvania, hereby prays that an appeal issue to the said court herein and for an order fixing the amount of the bond thereon and respectfully shows:

1. That the petitioner was the appellant and the Commonwealth of Pennsylvania was the appellee in the appeal to the Supreme Court of Pennsylvania, which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County making a settlement of tax against the petitioner for the tax and calendar year ending December 31, 1930, fixing the liability of the petitioner for a tax in the amount of $1,441.39 under the alleged authority of an Act of Assembly [fol. 274] of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, Laws of Pennsylvania, 1929.

2. That the petitioner, Schuylkill Trust Company, a domestic corporation, to which letters patent were issued upon October 17, 1887, filed its report for the twelve months ending December 31, 1930 in the Department of Revenue as required by the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673, and that thereupon the Department of Revenue made a settlement of tax against the said petitioner under the alleged authority of the said Act of Assembly in the amount of $2306.08 upon January 25, 1932 which was approved by the Department of the Auditor General January 26, 1932.

3. That subsequent thereto and in due course a petition for resettlement was filed which was refused by the said Departments of Revenue and of the Auditor General. Thereupon a petition for review was filed with the Board of Finance and Revenue which Board made a resettlement of the said tax under the alleged authority of the said act upon January 26, 1933 whereby tax was imposed in the amount of $2,290.14, from which resettlement the petitioner took an appeal to the Court of Common Pleas of Dauphin County.

4. That hearing was had in the said Court of Common Pleas of Dauphin County upon the said appeal upon an agreed statement of facts and after argument, said court upon October 19, 1933 affirmed the settlement of tax made by the Board of Finance and Revenue and directed the entry of judgment nisi in the amount of $1719.71 together with costs and Attorney General's Commission thereon in a total amount of $1863.17, which judgment was made absolute November 24, 1933.

[fol. 275] 5. That thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania which is the highest and the court of last resort of said state, from the judgment of the Court of Common Pleas of Dauphin County. That upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 30, 1934 filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Chief Justice Frazer.

6. That in due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, your petitioner filed its Petition for Reargument July 21, 1934, which was denied by the said court upon September 25, 1934. Your petitioner thereupon, to wit, November 26, 1934 presented to the Supreme Court of Pennsylvania its Petition for the allowance of an Appeal to the Supreme Court of the United States which was refused by the Supreme Court of Pennsylvania November 28, 1934.

7. That subsequent thereto and in due course your petitioner presented its petition for the allowance of an ap-

peal to the Supreme Court of the United States which was allowed December 14, 1934 by Roberts, Associate Justice, Supreme Court of the United States.

8. That in due course the appeal was heard before the Supreme Court of the United States and upon November 11, 1935 the opinion of the said court was delivered and filed wherein and whereby the judgment of this court was reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States (296 U. S. 113). The judgment of this court was reversed because it was based upon the Act [fol. 276] of April 25, 1929, P. L. 673, which was discriminatory in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and United States Revised Statutes, Section 5219, and United States statutes.

9. That thereafter, upon February 11, 1936, the Commonwealth of Pennsylvania presented a petition to the Court of Common Pleas of Dauphin County praying the court to revise its original judgment entered November 24, 1933, which had been affirmed by this court June 30, 1934 and reversed by the Supreme Court of the United States November 11, 1935, by entering judgment in favor of the Commonwealth and against this petitioner in the amount of $2334.57 for tax imposed upon the full actual net asset value of the shares of stock of the petitioner under authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640 and that such court issue a rule upon this petitioner to show cause why such judgment should not be entered. February 11, 1936 the court issued a rule upon this petitioner to show cause why the judgment prayed for should not be entered.

10. That to such rule so made by the Dauphin County Court the petitioner filed a demurrer praying the judgment of the court whether it should be required to make any answer to the petition and that it be hence dismissed with its reasonable costs in this behalf sustained. The causes of demurrer are fully set forth in the demurrer. The grounds thereof were, inter alia, that the petitioner was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement or to make a tax settlement under

the Act of June 13, 1907, Pamphlet Laws 640, there being no such law in force in the State of Pennsylvania either at the time of the petition or during the tax and calendar year for which the tax settlement was originally made and [fol. 277] for which the petition prayed that such settlement be made, and that the same constitutional defects which the Commonwealth admitted made void the Acts of April 25, 1929, Pamphlet Laws 673, May 7, 1927, Pamphlet Laws 853, and July 11, 1923, Pamphlet Laws 1071, made invalid and void the Act of June 13, 1907, Pamphlet Laws 640. (Record, 136a.) Oral argument was had upon the petition and demurrer. The Commonwealth contended that the Act of April 25, 1929, Pamphlet Laws 673 was unconstitutional and void and had been so held by the Supreme Court of the United States and that the prior acts of May 7, 1927, supra, and July 11, 1923, supra, were likewise unconstitutional and void and that therefore a revision of the judgment should be made by the entry of judgment against the Schuylkill Trust Company under the first proviso of the Act of June 13, 1907, Pamphlet Laws 640 by denying all deductions. The petitioner contended that judgment should be entered in its favor together with costs. The Dauphin County Court overruled the demurrer filed by the petitioner, without opportunity to file an answer to the petition, by such court's entering a judgment nisi upon April 20, 1936 imposing a tax together with interest and Attorney General's Commission in the amount of $1801.03 less costs expended in the Federal Court and allowed by said court in the amount of $344., the total judgment entered being $1,457.03. (Record, 152a.) The judgment was based upon the same Act of April 25, 1929, Pamphlet Laws 673 after the court had amended it by allowing deductions in addition to those written in the statute by the legislature.

11. That thereafter in due course the petitioner filed exceptions to the conclusions of law and judgment of the court, there being no dispute as to the facts which were set forth in the stipulations of facts filed at the time of the trial of the cause and before the entry of the original judgment dated November 24, 1933. (Record, 105a.)

12. That upon January 18, 1937 the Dauphin County Court filed an opinion entitled "Opinion Upon Exceptions" wherein it states that it considered certain exceptions filed, that it had sustained some and overruled and modified

others and thereupon proceeded to enter a new and differently formulated and calculated judgment in the amount of $1719.45, from which was deducted the hereinbefore re-
[fol. 278] ferred to amount of costs in the sum of $344., the judgment entered being $1,375.45. The new formula and calculation were compounded of values, some stated to be "book value" and some "market value", a compound of figures and facts not in evidence and not included in the Stipulation of Facts. The court in its opinion admits that its new and differing judgment is founded upon facts other than those upon which the tax settlement and the judgments of the state and federal courts were founded.

13. That subsequent thereto, finding that it had not ruled upon all of the exceptions, the court, upon January 22, 1937 filed another opinion entitled "Modified Judgment" wherein it is stated that the additional exceptions were overruled and proceeded to set forth the grounds of its final judgment which it entered upon such date, the judgment in this opinion being the sum of $1,441.39, which was the amount of the tax, interest and Attorney General's commission, $1,785.39, less the hereinbefore referred to federal court costs of $344. The formula and calculation upon which this new judgment was based are a compound of facts not in evidence as was the basis of the earlier judgment directed to be entered January 18, 1937. (Record, 221a, 222a).

14. That thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania which is the highest and the court of last resort of said state, from the judgment of the Court of Common Pleas of Dauphin County. That upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 25, 1937 filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Justice Stern.

15. That in due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme
[fol. 279] Court of Pennsylvania, your petitioner filed its Petition For Reargument July 2, 1937 and upon July 12, 1937 your petitioner was notified that reargument had been refused July 7, 1937.

16. That the statute, the validity of which is drawn in question on the ground that it is repugnant to section 3701 Revised Statutes of the United States, 31 U. S. C., Section 742, Act of Congress of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11, Act of Congress of July 21, 1921, c. 51, 42 Stat. 145, Act of Congress of February 6, 1905, c. 453, 33 Stat., part 1, 689, Act of Congress of July 17, 1916, c. 245, 39 Stat. 360 et seq., Sec. 16, Sec. 26, Section 5219 Revised Statutes of the United States, Clause 2, Section 8 of Article I of the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decision and mandate of the Supreme Court of the United States entered in this same case, to wit, Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, No. 3, October Term, 1935, 296 U. S. 113, is the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673.

17. The petitioner raised these statutory and constitutional questions before the Department of Revenue, the Department of the Auditor General and the Board of Finance and Revenue of the State of Pennsylvania and in its appeal from the settlement of tax to the Court of Common Pleas of Dauphin County and in its appeal to the Supreme Court of Pennsylvania. It also raised these statutory and constitutional questions in the Supreme Court of the United States (296 U. S. 113). These questions were raised also before the Dauphin County Court to whom the mandate of the Supreme Court of the United States had been referred by the Supreme Court of the State of Pennsylvania and which [fol. 280] Court of Common Pleas of Dauphin County made a settlement of tax against your petitioner embodied in a final judgment from which an appeal was taken to the Supreme Court of the State of Pennsylvania. These questions were raised also before the Supreme Court of Pennsylvania in the said recited appeal, the judgment of which court sustaining the judgment of the Dauphin County Court was filed June 25, 1937.

18. The settlement of tax made by the Court of Common Pleas of Dauphin County under the alleged authority of the said state statute of April 25, 1929, Pamphlet Laws 673, and the mandate of the Supreme Court of the United States issued in the case of Schuylkill Trust Company, Appellant,

vs. The Commonwealth of Pennsylvania, No. 3, October Term, 1935, 296 U. S. 113, which settlement of tax was embodied by the said Court in a judgment entered against your petitioner January 22, 1937, which judgment was affirmed by the Supreme Court of Pennsylvania June 25, 1937, was made in accordance with the following method and calculation:

"Statement

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171"

(Manifestly the term, "Total", should be Taxable.)

[fol. 281] The tax was calculated upon the said amount of $391,171 at the rate of five mills with a resultant tax in the amount of $1955.85 upon which credit was given for a payment on account of $570.43, leaving a balance due the Commonwealth in the amount of $1385.42. (Record, 221a.)

Upon such amount of $1385.42 interest was calculated from April 8, 1933 to January 22, 1937 in the amount of $314.95 making a total of $1700.37. Attorney General's commission was calculated upon the said sum of $1700.37 in the amount of $85.02, making a total of $1785.39. From this sum so claimed to be due in the amount of $1785.39 there was deducted:

"Less Costs allowed appellant in the Mandate of the Supreme Court of the United States, $344.00",

leaving a balance of $1441.39, which was the amount of the final judgment directed to be entered by the Dauphin County Court January 22, 1937. (Record, 223a.)

In order that the meaning, intent and effect of this method of calculation applied and embodied in the final judgment of January 22, 1937 and its relationship to the prior judgments entered by the same court in this same case embodying differing methods of settlement and calculations may be made clear, they will be set forth in the order of their sequence:

The method of settlement applied by the taxing officials and affirmed by the original judgment of the Dauphin County Court entered November 24, 1933 and affirmed by the Supreme Court of Pennsylvania June 30, 1934 is set forth in the stipulation of Facts (Record 19a). This method of settlement and the judgment consequent upon its application was considered by the Supreme Court of the United States and held void, for the reason that such Court held the statute under authority of which it was applied discriminatory and void. By this method of settlement, [fol. 282] formula and calculation the taxing officials of the Commonwealth of Pennsylvania determined the actual value of each and all of the assets of the petitioner. They determined the actual value of the amount of capital stock paid in, the surplus and undivided profits of the petitioner, which was the actual value of the net assets of the petitioner and was the difference between the actual value of the total assets and the amount of the liabilities. The actual value of the total assets was fixed at $3,755,882. The actual value of the amount of the capital stock paid in, the surplus and the undivided profits was fixed at $466,914. Included among the total assets were shares of stock issued by corporations which, under the express language of the statute, were exempted from the tax imposed. These shares of stock are described and classified in the statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares. All of the shares of stock included within such class of shares exempted by the state statute were valued at $155,989, included within which class were Philadelphia National Bank shares of the value of $20,202. These shares are listed in Exhibit "2" which was made a part of Specification of Objection 7 in the appeal taken to the trial court and are listed also in the Stipulation of Facts filed with such court. (Record, 10a, 14a, 15a, 22a).

The taxing officials then determined the value at which these exempt shares of stock of the actual value of $155,989 were taxed or relieved from tax or the capital stock of the corporations which issued them were taxed or relieved from tax under other taxing statutes of the state and fixed such value at $71,373, included within which were the said Philadelphia National Bank shares. (Record, 13a, 14a, 23a, 30a.) [fol. 283] They held that these shares of stock of the actual value of $155,989 were to be deducted from the amount of the capital stock paid in, the surplus and undivided profits at such portion of the said $71,373 as the amount of the capital stock paid in, the surplus and undivided profits bore to the value of the total assets and by such method fixed the amount of such deduction to be $8,886. The view of the taxing officials and the state courts was that the purpose of the exemption of such shares of stock under the language of the statute was to avoid double taxation (Record, 80a, 84a) and therefore since such shares of stock of the actual value of $155,989 had either been taxed or relieved from tax under other taxing statutes of the state or the corporations which issued them had been taxed or relieved from tax upon their capital stock under other taxing statutes of the state, the petitioner was not entitled to a deduction of the full value of these shares in the amount of $155,989. Thus did the state courts in their affirmation of the tax settlement and their construction and application of the state statute deny the claim of the petitioner for the deduction of the whole actual value of the Philadelphia National Bank shares in the amount of $20,202 and the whole actual value of other tax-free shares in the total amount of $155,989.

The calculation in application of the theory of the taxing officials of the Commonwealth of Pennsylvania construing and applying the statute is set forth in the Stipulation of Facts (Record, 18a) and is as follows:

$$441{,}667 + 25{,}247 - \left(\frac{467{,}714}{3{,}755{,}882} \times 71{,}373\right) = 458{,}028.$$

This calculation consists of the following elements: The sum, 441,667 + 25,247 or 466,914, was the actual value of the amount of the capital stock paid in, the surplus and undivided profits. From this sum of 466,914 was deducted the result of the calculation within the brackets, 8,886,

[fol. 284] with a resultant taxable value of 458,028. The numerator of the fraction, 467,714, is the amount of capital stock paid in, the surplus and undivided profits. (There was a mistake in addition. The numerator 467,714, should have been 466,914. See Stipulation of Facts, Record, 21a; Statement of Counsel for the Commonwealth, Record, 29a, 30a.) The denominator of the fraction, $3,755,882, is the value of the total assets. The multiplicand, $71,373, is the taxed and exempt value of the tax-free shares of the actual value of $155,989, determined by the taxing officials as hereinbefore set forth. The portion of the said 71,373 subtracted as the result of the method of settlement and calculation was 8,886 and resulted in the sum of 458,028 which was held to be the taxable value. The rate of tax, five mills, was thereupon applied to the said sum of $458,028 with a resultant tax settled against the petitioner in the amount of $2,290.14.

There were included within the total assets of the petitioner of the value of $3,755,882 national bank shares of the value of $20,202 which were included also within the class of exempt assets tax free under the statute of the whole actual value of $155,989. (Record 10a, 15a, 22a.)

The only deductions allowed under the tax settlement made as the statute was construed and applied by the taxing officials and state courts were a deduction of the amount of the liabilities from the amount of the total assets which resulted in a fixing of the amount of the capital stock paid in, the surplus and undivided profits at $466,914 and a deduction from this latter sum of the said sum of $8,886, whereby a taxable value was determined in the amount of $458,028. The deduction of the full value of the said described shares of stock ($155,989) was not allowed. The deduction allowed by reason of their ownership was $8,886, [fol. 285] which is 5.6 per centum of their whole value. There was no deduction of the full value of national bank shares of the value of $20,202, which was included and listed in the said class of shares (Record, 10a, 14a, 15a, 22a). The only deduction allowed was such portion of the said $20,202 as the amount of capital stock paid in, the surplus and undivided profits bore to the total assets, to wit, a deduction of $2,515, $\left(\frac{467,714}{3,755,882} \times 20,202 = 2515\right)$, which is 12.4 per centum of their whole actual value.

Among the total assets of the petitioner of the value of $3,755,882 were United States securities of the value of $134,907, Philippine Islands bonds of the value of $10,900 and Joint Stock Land Bank bonds of the value of $5,400. No deduction whatsoever was allowed by reason of the petitioner's ownership of these assets.

The state courts in affirming the settlement made by the taxing officials held that the shares of stock to be deducted under the express language of the statute were to be deducted to the extent of such portion of their value which was taxed or exempted from tax under other state taxing statutes (in the instant case, $71,373) as the amount of the capital stock paid in, the surplus and undivided profits bore to the total assets (in the instant case in the amount of $8,886) for the reason, said the trial court, that under the statute "The sole purpose of this exemption clause was to avoid double taxation" (Record 80a, 84a). The state courts construed and applied the statute as directing the deduction of $8,886, 5.6 per centum of the whole actual value ($155,989) of certain assets in order not to tax such portion twice, thereby construing and applying the statute as imposing a tax upon all assets not deducted, it being self-[fol. 286] evident that if $8,886 of the value of assets were to be deducted in order to avoid double taxation, such assets as were not deducted were, in the opinion of the state courts, to be taxed once and that such was the intent and purpose of the statute. Hence it is that the state courts construed and applied the statute as imposing a tax upon the assets of the trust company less certain prescribed deductions and determined the amount of the tax liability by reason and on account of the kind of assets owned by the trust company and not upon the shareholders' interest in the shares of stock issued by the trust company.

In so holding the state courts ignored the fact that there was included within the said class of exempt shares of stock the national bank shares of the value of $20,202 and that the state was without authority to make such shares the basis for any other and further taxation, the petitioner being subject to tax upon such shares at their actual net asset value as the owner thereof under the Pennsylvania Act of April 25, 1929, Pamphlet Laws 677. With reference to the United States securities, the Philippine Islands bonds and the Joint Stock Land Bank bonds, the state

courts admitted that they were non-taxable assets, that the state was without authority to impose a tax upon them but held that they were not taxed, for the reason that, said they, the tax imposed by the said Act of April 25, 1929, Pamphlet Laws 673, was a tax upon shares qua shares, a tax upon the shareholders' interest in the shares issued by the petitioner, and not a tax upon any of the assets owned by the petitioner.

The petitioner contended that the tax was not a tax upon shares as shares, that the statute expressly exempted certain assets owned by the trust company at their whole actual value and imposed the tax solely with reference to remaining assets and that therefore under the tax settle-
[fol. 287] ment there was not only a taxation of such non-taxable securities but also a discrimination against them, by reason of the exemption allowed to certain favored assets described in the statute. The petitioner contended that the proper method of taxation in order to construe the state statute in conformity with the Acts of Congress and the Constitution of Pennsylvania and of the United States and thus carry out the intent of the state legislature was to determine the taxable value to which the rate of tax was to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares, and the full value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, and that when such method is applied the amount of the tax is $570.43, which the petitioner paid (See Defendant's Request for Conclusion of Law 18, Record, 43a, 24a). The petitioner contended also that, in addition to the fact that the statute as written and construed and applied to it imposed a tax upon assets, such statute as construed and applied to it discriminated against the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds because they were not deducted and eliminated from consideration at their full actual value, although there was a deduction made of a portion of the value of the tax-free shares of stock exempted under the express language of the statute and that consequently the immunity of such United States securities and such bonds and federal instrumentalities was infringed and that the national bank shares being

subject to tax under the Pennsylvania statute of April 25, 1929, Pamphlet Laws 677, could not be made the basis of any other or further taxation and therefore must of necessity be deducted at their full value and eliminated entirely [fol. 288] from consideration in determining any tax imposed under the Act of April 25, 1929, Pamphlet Laws 673, the statute under consideration in the instant case.

Though the state supreme court affirmed the judgment of the trial court and held, upon authority of its earlier decision in the case of Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921) construing and applying the Act of June 13, 1907, Pamphlet Laws 640, that the petitioner was not entitled to a deduction of the whole value of the shares of stock ($155,989) made tax-free under the express language of the Act of April 25, 1929, Pamphlet Laws 673, and thus denied, in its construction and application of the said Act of 1929, supra, the claim of the petitioner for the deduction of the full value of the national bank shares ($20,202) owned by it, the supreme court said that the question as to the claim and right of the petitioner for the deduction of the whole value of the national bank shares was not raised in the original Specification of Objections filed with the trial court, was not discussed by the trial court and therefore would not be considered by it. This statement of the court is erroneous as is disclosed by the portions of its opinion which precede the statement as well as the sentence immediately following it. That the trial court discussed and ruled upon the question is likewise disclosed by its opinion, its judgment and in particular those portions of its opinion covered by Exceptions of the petitioner Nos. 18, 22, 23, 24, 25, 31, 32; see also conclusions of law of the lower court Nos. 5 and 7. (Record, 44a-85a, 85a-103a.) The petitioner contended that the question was raised before the taxing officials, the trial court and the state supreme court as is shown by the record. (See Specification of Objection 7, of which Exhibit "2" is made a part, Record, 10a, 15a; Stipulation of Facts, Record, 22a, [fol. 289] 23a; Statement of Counsel for the Commonwealth, Record, 31a; Requests for Conclusions of Law Nos. 8, 10, 11, 16, 17, 18 filed with the trial court, Record, 35a-43a; See Assignments of Error and Statement of Questions Involved filed in the Supreme Court of Pennsylvania

printed in Transcript of Record, Supreme Court of the United States, October Term, 1935, No. 3, pages 72 to 90.)

The petitioner contended that having recognized, discussed, passed upon and denied the claim of the petitioner for the deduction of the whole value of all the shares of stock tax-free under the state statute, both state courts recognized, discussed, passed upon and denied the claim of the petitioner for the deduction of the whole value of the Philadelphia National Bank shares which were included within such class of shares tax-free under the statute. The state courts knew and must be held to have known that they were dealing with a federal matter, national bank shares, the right and authority of the state to tax or to consider which in the determination of a tax was a matter solely and exclusively within the control of the federal government and was prescribed by federal statute, and that they were required, both under the decisions of the state courts and of the United States Supreme Court, to take judicial notice of public acts of Congress as well as of state statutes without their being specifically pleaded and therefore were required to take judicial notice of the provisions of Section 5219 of the Revised Statutes of the United States and of the decision of the Supreme Court of the United States in the case of Bank of California v. Richardson, 248 U. S. 476 (1919). (Flanigan v. Washington Ins. Co., 7 Pa. 306 (1848); Ohio v. Hinchman, 27 Pa. 479 (1856); Phila. & R. Ry Co. v. Parry, 66 Pa. Super. Ct. 49 (1917); Goldberg v. Friedrich, 279 Pa. 572, 574 (1924); St. Louis, I. Mt. & So. Ry Co. v. Starbird, 243 U. S. 592 (1917).) The record shows that the attention of the trial court was called [fol. 290] expressly to this federal statute in the Requests for Conclusions of Law filed with such court before the filing of the opinion of the said court and its entry of judgment nisi. (See Docket Entries, Record 1a, and Record 35a-43a). The subject matter of national bank shares being covered by uniform federal rule declared in the federal statute, the state courts could not determine the question of the claim for the deduction of the whole value of these national bank shares upon the ground of any local law, the question whether or not a right claimed under a federal statute or the United States Constitution was distinctly and sufficiently pleaded and brought to the notice of the state courts being itself a federal question, in the decision

of which the Supreme Court of the United States, on writ of error, is not concluded by the decision of the Supreme Court of Pennsylvania. (Carter v. Texas, 177 U. S. 442, 447 (1900).)

Having held that the tax imposed by the said Act of 1929 was a tax upon the shares of stock issued by the petitioner qua shares and that it was a tax upon the shareholders' interest in such shares, the state courts held that such tax was imposed upon shares owned by non-residents and their interest as well as those owned by residents of the state. The petitioner contended that if the tax was a tax upon shares qua shares and upon the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in [fol. 291] the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the petitioner having been incorporated under the laws of Pennsylvania October 17, 1887 (Record 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the Supreme Court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case is an amendment, was construed by the Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied, (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the de-

cision of the Supreme Court of the United States in the cited case of Corry v. Baltimore, supra, there was no authority in the state to impose a tax upon the shares owned by non-residents.

Subsequent to the issuing of the mandate of the Supreme Court of the United States the Dauphin County Court directed the entry of a judgment against your petitioner in the amount of $1457.03 upon April 20, 1936 which it held was entered in compliance with such mandate. (Record, 152a). The amount of such judgment, it was said, was determined in accordance with the method of settlement set forth in the judgment itself, which was an erroneous application of the principles set forth in its opinion.

[fol. 292] The Dauphin County Court held that the statute was unconstitutional and void as it had been applied theretofore but that it had the power to allow additional deductions which the State Supreme Court had theretofore held the legislature did not intend to allow and had not allowed by this statute. The Dauphin County Court held also that by allowing such additional deductions in the manner in which it was allowing them in the instant case not only was the statute made constitutional but there was also a compliance with the mandate of the Supreme Court of the United States.

The Dauphin County Court held that the statute was to be applied by the application of the following method of settlement: (1) That the full market value, that is, the actual value of national bank shares and Federal Reserve Bank shares was to be deducted from the amount of capital stock paid in, surplus and undivided profits (the net assets) in all cases, irrespective of whether or not they were investments of the amount of capital stock paid in, surplus and undivided profits.

(2) That neither the shares of stock defined in the said statute and exempted from tax by the language of such statute nor the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and other obligations of the United States government and its agencies and instrumentalities were to be deducted from the amount of capital stock paid in, surplus and undivided profits at their full actual value unless the trust company-owner of such assets established as a fact that they were wholly investments of the amount of capital stock paid in, surplus and undivided

profits, that if it were not shown that they were wholly such investments, then in the case of such assets, the court said, "a proportionate deduction is to be made."

[fol. 293] (3) That the proportionate deduction was to be made according to the following formula (Record, 150a, 151a):

"(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made: (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

(4) That in the case of your petitioner, since it owned Philadelphia National Bank shares of the value of $20,202, the full value thereof was to be deducted, though it had not been shown that the national bank shares were wholly investments of capital stock paid in, surplus and undivided profits, and that, since the petitioner had not shown that United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of an actual value of $151,207, and the shares of stock defined and exempted by the language of the statute exclusive of the said national bank shares of an actual value of $135,787 were purchased, were wholly investments of the amount of capital stock paid in, surplus and undivided profits, a proportionate deduction was to be made in the manner outlined.

At this point the Dauphin County Court was confronted with the fact that this method of settlement could not be applied to the petitioner because there was nothing in the record to show book values of assets, what was meant by book values, what was meant by permanent investments and what the permanent investments owned by the petitioner were and their book value was. Nevertheless the Dauphin [fol. 294] County Court proceeded as the statement of the calculation of its judgment shows in the record (Record, 152a). It applied the actual values of each and all assets

though its formula outlined in its opinion was to the contrary. The judgment calculated was not determined in conformity with the method of settlement which the court approved and which it held complied with the mandate of the Supreme Court of the United States. It fixed the actual value of the amount of capital stock, surplus and undivided profits at $466,914; it deducted the actual value of the national bank shares in the amount of $20,202; it allowed a deduction of a portion of the actual value of the United States securities and a portion of the actual value of the remaining exempt shares of stock of a total value of $286,994 in the amount of $34,318 (Record, 152a). It arrived at such sum of $34,318 by the application of the following fraction:

$$\frac{446{,}712}{3{,}735{,}680} \times 286{,}944$$

The numerator of the fraction, $446,712, is the actual value of the amount of capital stock paid in, surplus and undivided profits, $466,914, minus the value of the national bank shares, $20,202.

The denominator of the fraction, $3,735,680, is the actual value of all the assets as shown in the stipulation of facts (Record, 19a), $3,755,882, less the actual value of the national bank shares, $20,202.

The multiplicand of the fraction, $286,944, (should be $286,994, see Record, 220a), is the actual value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, $151,207, plus the actual value of the shares of stock defined in the statute, $155,989, exclusive of the actual value of the national bank shares (Record, 22a) which had been deducted at their actual value of $20,202.

[fol. 295] As the result of the foregoing there was deducted from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the full actual value of the national bank shares, $20,202, and the sum of $34,318 which was a portion of the actual value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the exempt shares of stock defined and exempted by the language of the statute exclusive of the actual value of the national bank shares of a total value of $286,994, the total deduction being $54,520 making the taxable value of the capital stock $412,394, with a resultant tax in the amount of $2,061.97 (See Record, 152a).

Thereafter the court, seeing that it had determined a judgment by a method of calculation which did not apply the method of settlement which it had held in its opinion was a constitutional interpretation, construction and application of the statute and a compliance with the mandate of the Supreme Court of the United States and finding that there was no evidence of record as to book value of assets of the petitioner, no evidence as to what constituted permanent investments, what the permanent investments were which were owned by the petitioner and what the book values of permanent investments were (see Stipulation of Facts and Supplemental Stipulation of Facts, Record, 18a-24a), proceeded to change the valuations set forth in the method of calculation whereby it had in its prior judgment of April 20, 1936 determined the amount of the proportionate deduction for the exempt shares of stock defined in the language of the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds. (See Opinion, Record, 219a-222a). The court changed the numerator of the fraction from $446,712 to $418,650, which latter sum it says in its opinion "is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042, [fol. 296] total $441,667, which are the book values less the book values of National Bank Shares, $23,017, making $418,-650." (Record 219a.) The court changed the denominator of the fraction from $3,735,680 to $2,158,045, which it says in its opinion (Record, 220a) is "the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made." The court said "that the permanent investments amount to $2,181,062, and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045." The court changed the multiplicand, $286,944 ($286,994) to $286,121. The court said (Record, 220a), "Instead of the multiplicand used by us, $286,994, the correct multiplicand is $286,-121. This error is accounted for by the fact that the tax value of the Pennsylvania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,-121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994."

After having made such alterations in the figures applying its formula the court proceeded to add the sum of $35, which latter sum it says is the "appreciation which should be added to the result of the fraction * * *" As a result of the foregoing the proportionate deduction calculation becomes (Record, 220a):

$$\frac{418,650}{2,158,045} \times 286,121 + 35 = 55,541.$$

The first fact to be noted is that there is no evidence whatsoever upon which to base any of the figures embodied within this new proportionate method of calculation. There were no such facts or factors as book values of assets of the petitioner, what constituted permanent investments, what [fol. 297] the permanent investments of the petitioner were, if any there were, what their book or actual value was, considered by the taxing officers who made the tax settlement against your petitioner. This is demonstrated by the record itself and is admitted by the Dauphin County Court and the state Supreme Court in the opinions filed in the case of Commonwealth v. Provident Trust Company of Philadelphia, 40 Dauphin Co. Repts. 146, 41 Dauphin Co. Repts., 1; 319 Pa. 385, in which case it was said that in the year 1930, the year here in question, all settlements and methods of settlement and calculations were based upon actual values. (40 Dauphin, supra, 169). There were no such facts or factors before the Dauphin County Court in the trial of this case and the entry of its original judgment, before the Supreme Court of the state of Pennsylvania when it entered its final judgment June 30, 1934 or before the Supreme Court of the United States. Not only was there no such evidence but there was no hearing nor an opportunity for a hearing given the petitioner upon such matter. The truth of these statements is established by the opinions of the court itself which appear of record (Record, 145a, 219a).

As shown, the application of the new calculation fixes a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a portion of the value of the shares of stock exempted under the statute, exclusive of the national bank shares, of the total value of $286,994 at $55,541. Accordingly the Dauphin County Court upon January 18, 1937, applied its new cal-

culation (Record, 221a, 222a) and as a result thereof there was deduction from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the actual value of the national bank shares, $20,202, the recited proportionate deduction of $55,540 or a total deduction of $75,743, thereby fixing the taxable value at [fol. 298] $391,171 with a resultant tax in the amount of $1955.85.

Thereafter, finding that it had not ruled upon all of the exceptions filed by the petitioner, the court entered its final judgment upon January 22, 1937 in the amount of $1441.39 (Record, 222a, 223a. This final judgment differs from the judgment of $1375.45 entered January 18, 1937 solely in the amount of the interest calculation and Attorney General's Commission. All three of the judgments entered, the judgment of April 20, 1936, the judgment of January 18, 1937 and the final judgment of January 22, 1937, allow as a deduction the costs which the mandate of the Supreme Court of the United States stated was to be paid to the petitioner in the amount of $344. These costs, as the final judgment shows, are allowed as a deduction from a sum which includes interest calculated to January 22, 1937, as a result of which not only was a judgment entered against the petitioner for taxes but the petitioner was charged interest upon costs which were owing to it from the date of the decision of the Supreme Court of the United States, November 11, 1935, to January 22, 1937.

The Supreme Court of the state of Pennsylvania affirmed the final judgment which the lower court entered January 22, 1937 in favor of the Commonwealth and against the petitioner in the amount of $1441.39 and filed its opinion June 25, 1937. Its opinion is nothing more than an approval of everything done by the Dauphin County Court.

The Dauphin County Court and the state Supreme Court held that the tax imposed by the said statute was a tax upon the shares issued by the petitioner qua shares, that it was a tax upon the shareholders' interest in the shares, that it was imposed upon the shares owned by non-residents and their interest in such shares as well as those owned by the residents of the state. The petitioner contended that if the tax was a tax upon shares qua shares and upon [fol. 299] the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such

tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the petitioner having been incorporated under the laws of Pennsylvania October 17, 1887 (Record, 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the Supreme Court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case, is an amendment, was construed by the Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the Supreme Court of the United States in the cited case of Corry v. Baltimore, supra, there was no authority in the state to impose a tax upon the shares owned by non-residents.

[fol. 300] The petitioner also contended that the Supreme Court of the United States in its decision filed November 11, 1935 had held that none of the shares of stock issued by your petitioner was taxable for the reason that the state statute of 1929 was discriminatory and therefore unconstitutional and void and that it had so declared in its opinion.

The sole difference between the original judgment entered by the Dauphin County Court November 24, 1933 affirmed by the opinion and judgment of the state Supreme

Court June 30, 1934, from which judgment the appeal was taken to the Supreme Court of the United States, and this latest judgment of the state Supreme Court which is said to be a compliance with the mandate of the Supreme Court of the United States is an increase in the amount of the deductions allowed by reason of the petitioner's ownership of national bank shares, United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, the deduction allowed being a deduction of the full value of the national bank shares and a deduction of a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute, such portion being 19 per centum of their entire value.

The state courts now hold that the statute as it is now construed and applied in the tax settlement embodied in the judgment entered against the petitioner is constitutional and complies with the mandate of the Supreme Court of the United States. The state courts adhere to the conclusion that under the new method of settlement there is no taxation of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute and no discrimination against such assets though the state courts adhere to the application [fol. 301] of the "proportionate" method of settlement whereby only a portion of non-taxable and exempt assets are deducted and wherein the entire value of non-taxable assets such as national bank shares and Federal Reserve Bank shares are deducted despite the fact that there is no distinction or difference in degree of exemption and non-taxability between these various assets. The petitioner contended that the discrimination between these assets is manifest and the violation of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States is clear.

The state courts hold that they have the power to amend the statute by allowing additional deductions and changing the method of settlement though such amendment of the statute and change in the method of settlement are contrary to every decision of the state courts to and including

the final decision of the state Supreme Court filed June 30, 1934 from which the first appeal was taken to the Supreme Court of the United States. The state courts hold that the tax is a tax upon shares qua shares and that there is constitutional authority to tax the shares of non-resident shareholders though it is manifest that the statute is a revenue statute and not a statute regulating the issuing of the shares of stock of a domestic corporation.

The petitioner contended that the "proportionate" method of settlement whereby a portion of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted under the express language of the statute was deducted imposes tax upon such securities, bonds and shares of stock, that such taxation is the necessary result of the application of such method of settlement, that the formula and calculation includes the value of such assets in the denominator of the fraction used to determine the portion of such assets to be deducted, the value of the United States [fol. 302] securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted in the express language of the statute being included within the denominator of the fraction set forth in the judgment entered against the petitioner, to wit, $\frac{418,650}{2,158,045}$, it being self-evident that the larger the denominator of such fraction the less will be the amount of the deduction allowed and the less the amount of the deduction the larger the amount of tax imposed.

The petitioner contended that the discrimination against the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted by the express language of the statute is likewise self-evident, for the method of settlement approved in the Girard Trust Company case (Record, 182a) and in the instant case (Record, 221a) requires that the full value of national bank shares and Federal Reserve Bank shares, both of which are shares of stock which are included within the shares of stock defined, described and exempted under the express language of the statute, be deducted in all cases and only a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds

and the other members of the class of shares of stock defined and exempted under the express language of the statute is required to be deducted unless it can be established as a fact by the trust company-owner that such assets are wholly investments of the amount of capital stock paid in, surplus and undivided profits. The petitioner contended that it is self-evident that if the entire value of national bank shares and Federal Reserve Bank shares be deducted in order that they might not be included in the measure of the tax, a deduction of the entire value of all non-taxable and exempt assets is required in order that they be not taxed and be not discriminated against.

[fol. 303] The petitioner contended that there is no authority in the state courts to make a tax settlement against it, for the reason that the Supreme Court of the United States, federal questions having been raised, upon appeal held that the statute was void because discriminatory, that such decision of the federal court was final and that there was no authority in the state courts to amend the statute by allowing additional deductions, that the allowance of such additional deductions was judicial legislation in violation of Section 1, Article IX, and Section 1, Article II, of the Constitution of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The petitioner contended that under the decision and mandate of the Supreme Court of the United States judgment should have been entered for the petitioner with costs.

19. The statutory and constitutional questions raised are:

1. Does the judgment entered by the Supreme Court of the state of Pennsylvania comply with the mandate of the Supreme Court of the United States?

2. The Supreme Court of the United States upon appeal, federal questions having been raised, having held the Act of April 25, 1929, Pamphlet Laws 673, discriminatory and therefore unconstitutional and void, does the Supreme Court of the state of Pennsylvania, to which court the mandate of the Supreme Court of the United States was issued and directed in this case and which state court admits the unconstitutionality of the said statute, have the power to amend the statute by allowing exemptions and deductions from tax in addition to those exemptions and deduc-

tions allowed by the legislature in the enactment of the statute and thereupon under the alleged authority of the statute so amended and the mandate of the Supreme Court of the United States to enter a judgment for tax against the [fol. 304] petitioner?

3. The Supreme Court of the United States upon appeal, federal questions having been raised, having held the Act of April 25, 1929, Pamphlet Laws 673 unconstitutional and void and having reversed the judgment of the Supreme Court of Pennsylvania and issued its mandate to such state court, does the final judgment entered by the state Supreme Court construing and applying the said state statute constitute judicial legislation in violation of Section 1 of Article II of the Constitution of the state of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States?

4. The Supreme Court of the United States upon appeal, federal questions having been raised, having held the Act of April 25, 1929, Pamphlet Laws 673 unconstitutional and void and having reversed the judgment of the Supreme Court of Pennsylvania and issued its mandate to such state court, does the state Supreme Court have the authority to revise its judgment by entering a new judgment based upon facts not in evidence?

5. Does the final judgment entered by the state Supreme Court violate Section 1 of Article IX of the Constitution of the state of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States by reason of the fact that the judgment entered by the state Supreme Court under the alleged authority of the said Act of April 25, 1929, Pamphlet Laws 673 is based upon and embodies a method of settlement differing from that imposed and applied by the taxing officers of the state to other corporations made subject to the said statute in the same tax and calendar year ending December 31, 1930?

[fol. 305] 6. Does the said state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement embodied in the judgment entered against the petitioner was made, violate Clause 2 of Section 8 of Article I of

the Constitution of the United States which gives power to the Congress of the United States to borrow money on the credit of the United States, Section 3701 Revised Statutes of the United States, 31 U. S. C. Sec. 742, which exempts obligations of the United States from state taxation, and the Fourteenth Amendment to the Constitution of the United States which forbids a state to deprive any person of life, liberty or property without due process of law and to deny to any person within its jurisdiction the equal protection of the laws, by reason of the fact that in the settlement of tax made against your petitioner, embodied in the judgment entered by the Court of Common Pleas of Dauphin County and affirmed by the Supreme Court of the state of Pennsylvania, to determine the taxable value to which the rate of tax was applied in order to determine the amount of the tax liability, there was an exemption from taxation allowed by deducting from the value of the net assets of the petitioner, ($467,714 which sum was changed by the state courts to $466,914), (the amount of the capital stock paid in, the surplus and undivided profits), the full value of certain assets owned by the petitioner, to wit, Philadelphia National Bank shares of the value of $20,202, which national bank shares are included within the class of exempt assets owned by the petitioner described and defined in the said state statute consisting of shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, [fol. 306] or relieved from the payment of capital stock tax or tax on shares, the total value of which exempt shares of stock so described and defined in the statute, including the said value of the national bank shares, is $155,989 and only a portion of the value of the non-taxable United States securities owned by your petitioner of a total value of $134,907 was deducted, the portion of the value of the non-taxable United States securities so deducted being 418,650

2,158,045

of 134,907 or $26,171 which is 19 per centum of their full value, all of which shares of stock and United States securities were included at their full value in the value of your petitioner's total assets, ($3,755,882), and (except the national bank shares) within the denominator of the said fraction, $2,158,045, there being in the said settlement of tax a diminution of tax liability by reason and on account

of the petitioner's ownership of the national bank shares which are deducted at their full value and an increase of tax liability by reason and on account of its ownership of the said United States securities of the value of $134,907, only a portion of the value of which was deducted, with a consequent taxation of and discrimination against said United States securities, your petitioner and the owners of its shares by reason of its ownership thereof, the petitioner contending that, if the state courts have the power to amend the state statute by allowing exemptions and deductions in addition to those allowed and defined by the legislature in the said statute after the entry of the judgment of the Supreme Court of the United States November 11, 1935 holding said statute discriminatory and void and if such amendment of the statute by the state courts is not judicial legislation in violation of state and federal constitutions, then and in that case for the purpose of the taxation of the capital, capital stock or the shares of stock issued by the [fol. 307] petitioner, the petitioner must be regarded as though it did not own such United States securities and that they, together with the amount of your petitioner's liabilities, should be deducted at their full value from the value of the total assets of the petitioner?

7. Does the said state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement embodied in the judgment entered against the petitioner was made, violate the provisions of the Act of Congress of the United States of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11, Act of Congress of the United States of July 21, 1921, c. 51, 42 Stat. 145, and Act of the Philippine Legislature Number 2940 approved February 5, 1921, under the provisions of which Philippine Islands 5½% Public Improvement Loan due Aug. 1, 1941 bonds were issued and of which your petitioner owned bonds of the value of $10,900, and Act of Congress of the United States of February 6, 1905, c. 453, 33 Stat., part 1, 689, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives power to the Congress of the United States to borrow money on the credit of the United States and the Fourteenth Amendment to the Constitution of the United States which forbids a state to deprive any person of life, liberty or property without due process of law and to deny to any person within its jurisdiction the equal protection of the laws, by

reason of the fact that in the settlement of tax made against your petitioner, embodied in the judgment entered by the Court of Common Pleas of Dauphin County and affirmed by the Supreme Court of the State of Pennsylvania, to determine the taxable value to which the rate of tax was applied in order to determine the amount of the tax liability, [fol. 308] there was an exemption from taxation allowed by deducting from the value of the net assets of the petitioner, ($467,714 which sum was changed by the state courts to $466,914), (the amount of the capital stock paid in, the surplus and undivided profits), the full value of certain assets owned by the petitioner, to wit, Philadelphia National Bank shares of the value of $20,202, which national bank shares are included within the class of exempt assets owned by the petitioner described and defined in the said state statute consisting of shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, the total value of which exempt shares of stock so described and defined in the statute, including the said value of the national bank shares, is $155,989 and only a portion of the value of the non-taxable Philippine Islands bonds owned by your petitioner of a total value of $10,900 was deducted, the portion of the value of the non-taxable Philippine Islands bonds so deducted being $\frac{418,650}{2,158,045}$ of 10,900 or $2,114 which is 19 per centum of their full value, all of which shares of stock and Philippine Islands bonds were included at their full value in the value of your petitioner's total assets, ($3,755,882), and (except the national bank shares within the denominator of the said fraction, $2,158,045, there being in the said settlement of tax a diminution of tax liability by reason and on account of the petitioner's ownership of the national bank shares which are deducted at their full value and an increase of tax liability by reason and on account of its ownership of the said Philippine Islands bonds of the value of $10,900, only a portion of the value of which was deducted, with a consequent taxation of and discrimination against said Philippine Islands bonds, your petitioner and the owners of its shares by reason of its own- [fol. 309] ership thereof, the petitioner contending that, if the state courts have the power to amend the state statute

by allowing exemptions and deductions in addition to those allowed and defined by the legislature in the said statute after the entry of the judgment of the Supreme Court of the United States November 11, 1935 holding said statute discriminatory and void and if such amendment of the statute by the state courts is not judicial legislation in violation of state and federal constitutions, then and in that case for the purpose of the taxation of the capital, capital stock or the shares of stock issued by the petitioner, the petitioner must be regarded as though it did not own such Philippine Islands bonds and that they, together with the amount of your petitioner's liabilities, should be deducted at their full value from the value of the total assets of the petitioner?

8. Does the said state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement embodied in the judgment entered against the petitioner was made, violate the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916, c. 245, 39 Stat. 360, Secs. 16, 26, under the provisions of which Joint Stock Land Bank bonds were issued and of which your petitioner owned bonds of the value of $5,400, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives power to Congress to borrow money on the credit of the United States and the Fourteenth Amendment to the Constitution of the United States which forbids a state to deprive any person of life, liberty or property without due process of law and to deny to any person within its jurisdiction the equal protection of the laws, by reason of the fact that in the settlement of tax made against your [fol. 310] petitioner, embodied in the judgment entered by the Court of Common Pleas of Dauphin County and affirmed by the Supreme Court of the State of Pennsylvania, to determine the taxable value to which the rate of tax was applied in order to determine the amount of the tax liability, there was an exemption from taxation allowed by deducting from the value of the net assets of the petitioner, ($467,714 which sum was changed by the state courts to $466,914), (the amount of the capital stock paid in, the surplus and undivided profits), the full value of certain assets owned by the petitioner, to wit, Philadelphia National Bank shares of the value of $20,202, which national bank shares are included within the class of exempt assets owned by the petitioner described and defined in the said state statute con-

sisting of shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, the total value of which exempt shares of stock so described and defined in the statute, including the said value of the national bank shares, is $155,989 and only a portion of the value of the non-taxable Joint Stock Land Bank bonds owned by your petitioner of a total value of $5,400 was deducted, the portion of the value of the non-taxable Joint Stock Land Bank bonds so deducted being $\frac{418,650}{2,158,045}$ of 5,400 or $1047 which is 19 per centum of their full value, all of which shares of stock and Joint Stock Land Bank bonds were included at their full value in the value of your petitioner's total assets, ($3,755,882), and (except the national bank shares) within the denominator of the said fraction, $2,158,045, there being in the said settlement of tax a diminution of tax liability by reason and on account of the petitioner's ownership of the national bank shares which are deducted at their full [fol. 311] value and an increase of tax liability by reason and on account of its ownership of the said Joint Stock Land Bank bonds of the value of $5,400, only a portion of the value of which was deducted, with a consequent taxation of and discrimination against said Joint Stock Land Bank bonds, your petitioner and the owners of its shares by reason of its ownership thereof, the petitioner contending that, if the state courts have the power to amend the state statute by allowing exemptions and deductions in addition to those allowed and defined by the legislature in the said statute after the entry of the judgment of the Supreme Court of the United States November 11, 1935 holding said statute discriminatory and void and if such amendment of the statute by the state courts is not judicial legislation in violation of state and federal constitutions, then and in that case for the purpose of the taxation of the capital, capital stock or the shares of stock issued by the petitioner, the petitioner must be regarded as though it did not own such Joint Stock Land Bank bonds and that they, together with the amount of your petitioner's liabilities, should be deducted at their full value from the value of the total assets of the petitioner?

[fol. 312] 9. Does the said state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settle-

ment embodied in the judgment entered against the petitioner was made, violate Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws;" and the Fourteenth Amendment to the Constitution of the United States which forbids a state to deprive any person of life, liberty or property without due process of law and to deny to any person within its jurisdiction the equal protection of the laws, by reason of the fact that in the settlement of tax made against your petitioner, embodied in the judgment entered by the Court of Common Pleas of Dauphin County and affirmed by the Supreme Court of the State of Pennsylvania, to determine the taxable value to which the rate of tax was applied in order to determine the amount of the tax liability, there was an exemption from taxation allowed by deducting from the value of the net assets of the petitioner, ($467,714 which sum was changed by the state courts to $466,914), (the amount of the capital stock paid in, the surplus and undivided profits), the full value of certain assets owned by the petitioner, to wit, Philadelphia National Bank shares of the value of $20,202, which national bank shares are included within the class of exempt assets owned by the petitioner described and defined in the said state statute consisting of shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, the total value of which exempt shares of stock so described and defined in the statute, including the said value of the national bank shares, is $155,989 and only a portion of the [fol. 313] value of the non-taxable shares of stock owned by your petitioner of a total value of $135,787 was deducted, the portion of the value of the non-taxable shares of stock so deducted being, $\frac{418,650}{2,158,045}$ of 135,787 or $26,323 which is 19 per centum of their full value, all of which shares of stock so described, defined and exempted under the language of the statute, including therein the said national bank shares, of a total value of $155,989 were included at their full value in the value of your petitioner's total assets, ($3,755,882), and (except the national bank shares) within the

denominator of the said fraction, $2,158,045, there being in the said settlement of tax a diminution of tax liability by reason and on account of the petitioner's ownership of the natonal bank shares which are deducted at their full value and an increase of tax liability by reason and on account of its ownership of the said shares of stock of the value of $135,787, only a portion of the value of which was deducted, with a consequent taxation of and discrimination against said shares of stock, your petitioner and the owners of its shares by reason of its ownership thereof, the said shares of stock being similarly exempt under the language of the state statute as are the national bank shares, the petitioner contending that for the purpose of the taxation of the capital, capital stock or the shares of stock issued by the petitioner, the petitioner must be regarded as though it did not own such shares of stock and that they, together with the amount of your petitioner's liabilities, should be deducted at their full value from the value of the total assets of the petitioner?

[fol. 314] 10. Does the state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement embodied in the final judgment which the state Supreme Court entered against the petitioner was made, violate the state and federal constitutional and statutory provisions recited in the Assignments of Error by reason of the fact that by the settlement made under authority of the statute there is (1) in the case of trust companies owning Federal Reserve Bank shares and national bank shares a deduction of their entire value from the value of the net assets of the trust company, (2) in the case of trust companies owning United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and obligations of federal agencies and instrumentalities a deduction of a portion of their value from the value of the net assets of the trust company, which portion in the case of your petitioner was 19 per centum of the entire value of such non-taxable and exempt assets, (3) in the case of trust companies owning shares of stock exempted under the language of the said state statute consisting of "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares" a deduction of a portion of

their value from the value of the net assets of the trust company, which portion in the case of your petitioner was 19 per centum of the entire value of such non-taxable and exempt assets, while (4) in the case of other trust companies the entire value of such non-taxable and exempt United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds, obligations of federal agencies and instrumentalities and such shares of stock is deducted from the value of the net assets of the trust company, the tax liability being determined by the kind and amount of assets owned by each trust company without regard to the value of the shares of stock issued by each trust company and the interest of the shareholders therein?

[fol. 315] 11. Does the said state statute of April 25, 1929, Pamphlet Laws 673 and such statute as it was construed and applied in the tax settlement and judgment entered against the petitioner violate Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws by reason of the fact that the Supreme Court of Pennsylvania in its opinion and judgment affirming the judgment of the Dauphin County Court and the settlement of tax made against your petitioner construed and upheld the said Act of April 25, 1929, supra, as imposing a tax upon the shares of stock issued by your petitioner qua shares and upon shares owned by non-residents of the state of Pennsylvania? The petitioner contended that the statute was unconstitutional and void and had been so declared by the Supreme Court of the United States, that the tax imposed was not a tax upon the shares qua shares, upon the shareholders' interest in the shares, and that if the tax, as it was imposed in the settlement and judgment entered against it, be a tax which is imposed legally and constitutionally upon the shares issued by it, upon the interest of the shareholders in the shares owned by them, shares owned by non-residents of the state are beyond the taxing jurisdiction of the state and their taxation violated the recited constitutional provisions.

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[fol. 316] 20. The petitioner believes and therefore avers that the said state statute of April 25, 1929, Pamphlet

Laws 673, under authority of which the state Supreme Court entered its final judgment against the Schuylkill Trust Company is unconstitutional and void and has been held to be unconstitutional and void by the Supreme Court of the United States in this same case by its decision filed November 11, 1935 (296 U. S. 113), that the judgment entered by the said state Supreme Court violates the mandate of the Supreme Court of the United States issued in such case and that the construction and application of the said state statute embodied in the judgment entered against the petitioner by the state Supreme Court under the alleged authority of the said state statute constitute judicial legislation and are repugnant to the hereinbefore recited provisions of the Constitution of the state of Pennsylvania, the Constitution of the United States and the statutes of the United States, constitute a taxation of and a discrimination against obligations, securities and instrumentalities of the United States government and violate Section 1 of Article IX and Section 1 of Article II of the Constitution of the state of Pennsylvania, Clause 2 of Section 8 of Article I of the Constitution of the United States giving to the Congress of the United States the power to borrow money on the credit of the United States and constitute a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the decisions of the Supreme Court of the United States, in particular the decisions of such court in the cases of Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, 296 U. S. 113 (1935), Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass., 279 U. S. 620 (1929), Bank of California v. Richardson, 248 U. S. 476 (1919) and Corry v. Baltimore, 196 U. S. 466 (1905).

[fol. 317] 21. This case is reviewable by the Supreme Court of the United States on appeal under the Act of Congress of February 13, 1925, c. 229, 43 Stat. 936, Act of Congress of January 31, 1928, c. 14, 45 Stat. 54, which provides: "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal" and the Act of Congress of April 26, 1928, c. 440, 45 Stat. 466, because there was clearly drawn into question from the beginning of the litigation the validity of the said state

statute of April 25, 1929, Pamphlet Laws 673 and its construction and application to the petitioner and its shareholders on the ground that the said statute was unconstitutional and void and that as construed and applied in the tax settlement made against this petitioner embodied in the final judgment of the state Supreme Court it constituted judicial legislation and that the said state statute and its construction and application against the petitioner and its shareholders are repugnant to the hereinbefore recited statutes of the United States, the hereinbefore recited provisions of the Constitution of the state of Pennsylvania and the Constitution of the United States and the decisions of the Supreme Court of the United States, in particular the decisions of such Court in the cases of Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, 296 U. S. 113 (1935), Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass. 279 U. S. 620 (1929), Bank of California v. Richardson, 248 U. S. 476 (1919) and Corry v. Baltimore, 196 U. S. 466 (1905) and the decision of the Supreme Court of Pennsylvania and its judgment rendered thereon against your petitioner was in favor of the validity of the said statute of the state.

[fol. 318] 22. The petitioner submits herewith a copy of the Record, Brief for Appellant, Brief for Appellee in the Supreme Court of Pennsylvania, a copy of the opinion of the Supreme Court of Pennsylvania as written by Mr. Justice Stern filed June 25, 1937 affirming the judgment of the Court of Common Pleas of Dauphin County and a copy of the Petition presented to the Supreme Court of Pennsylvania for reargument of the appeal. The petitioner presents herewith also a separate typewritten Statement as to Jurisdiction in accordance with the provisions of Rule 12 of the Supreme Court of the United States.

[fol. 319] ASSIGNMENTS OF ERROR

And the said petitioner assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of the state of Pennsylvania erred in entering its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County directing the entry of judgment in favor of the Commonwealth

of Pennsylvania and against the petitioner, the Schuylkill Trust Company, in the sum of $1441.39.

2. The Supreme Court of the state of Pennsylvania erred in not directing judgment to be entered in favor of the Schuylkill Trust Company and against the Commonwealth of Pennsylvania together with costs.

3. The Supreme Court of the state of Pennsylvania erred in holding that the opinion, decision and mandate of the Supreme Court of the United States authorized and commanded the Court of Common Pleas of Dauphin County to revise the judgment affirming a tax settlement made by the taxing officers of the state of Pennsylvania against the Schuylkill Trust Company for the tax and calendar year ending December 31, 1930 under authority of the State statute of April 25, 1929, Pamphlet Laws 673, which such court entered against the Schuylkill Trust Company upon November 24, 1933 in the amount of $1863.17 and which was affirmed by the Supreme Court of the state of Pennsylvania upon June 30, 1934 and which was reversed by the Supreme Court of the United States upon November 11, 1935 by making a tax settlement against the Schuylkill Trust Company for the same tax and calendar year and entering a judgment against the said Schuylkill Trust Company for the amount of such tax settlement by construing and applying the said state statute of April 25, 1929, Pamphlet Laws [fol. 320] 673 as imposing a tax upon all shares of stock qua shares issued by the Schuylkill Trust Company owned by residents and non-residents of the state and determining the taxable value of such shares of stock to which the millage rate of tax was applied by adding together the actual value of the amount of the capital stock paid in, the surplus and undivided profits ($466,914) and deducting therefrom the full value ($20,202) of national bank shares owned by it and deducting therefrom also a portion ($26,323) of the full value ($135,787) of the shares of stock owned by it exempted from the tax under the express language of the statute and deducting therefrom also a portion ($26,171) of the full value ($134,907) of the United States securities owned by it, a portion ($2,114) of the full value ($10,900) of the Philippine Islands bonds owned by it, a portion ($1,047) of the full value ($5400) of the Joint Stock Land Bank bonds owned by it and imposing a tax at the rate of five mills upon the taxable value so determined in the

amount of $391,171, with a resultant tax in the amount of $1955.85 in accordance with the following statements set forth in the opinions of the Court of Common Pleas of Dauphin County filed January 18, 1937 and January 22, 1937 (Record, 221a, 223a):

"Statement

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171
[fol. 321] Tax on same at 5 mills		$1,955.85
Amount paid on account		570.43
Balance due Commonwealth		$1,385.42"

"Statement

"Balance due Commonwealth as directed in our opinion filed January 18, 1937	$1,385.42
Interest from April 8, 1933 to January 22, 1937	314.95
	$1,700.37
Attorney General's commission	85.02
	$1,785.39
Less Costs allowed appellant in the Mandate of the Supreme Court of the United States	344.00
Total	$1,441.39"

4. The Supreme Court of the state of Pennsylvania erred in that its construction and application of the said Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, by the judgment which it entered against the Schuylkill Trust Company constitute judicial legislation amending the statute by writing into it a provision granting additional exemptions from taxation in violation of Section 1 of Article II of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

5. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it imposes a tax upon and discriminates against United States securities owned by the petitioner in vio-
[fol. 322] lation of Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States, Section 3701 Revised Statutes of the United States, 31 U. S. C. Sec. 742, which exempts obligations of the United States from state taxation and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

6. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it imposes a tax upon and discriminates against Philippine Islands bonds owned by the petitioner in violation of the provisions of the Act of Congress of the United States of August 29, 1916, c. 416, 39 Stats. 548, Sec. 11, Act of Congress of the United States of July 21, 1921, c. 51, 42 Stat. 145, and Act of the Philippine Legislature Number 2940 approved February 5, 1921, Act of Congress of Feb-

ruary 6, 1905, c. 453, 33 Stat., part 1, 689, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

[fol. 323] 7. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it imposes a tax upon and discriminates against Joint Stock Land Bank bonds owned by the petitioner in violation of the provisions of "The Federal Farm Loan Act" of the United States Congress of July 17, 1916, c. 245, 39 Stat. 360, Sec. 16, Sec. 26, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives the Congress of the United States power to borrow money on the credit of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

8. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it imposes a tax upon and discriminates against shares of stock described and defined in the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares owned by the petitioner in violation of Section 1 of Article IX of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

[fol. 324] 9. The Supreme Court of the state of Pennsyl-

vania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it has been held to authorize the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks "flat", i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits which is the value of the net assets, irrespective of whether or not such shares of stock were purchased out of the capital stock paid in, the surplus and undivided profits, and to authorize the apportionment of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a class of assets owned by the petitioner and described in the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares, between the amount of its capital stock paid in, the surplus and undivided profits (the value of the net assets) and the amount of its liabilities, for the purpose of determining what portion of the value of the said United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and shares of stock is to be deducted from the amount of the capital stock paid in, the surplus and undivided profits (the value of the net assets) in order to determine the taxable value to which the rate of tax is to be applied and the consequent amount of tax required to be paid and for that purpose to include in the value of the petitioner's total assets the full value of assets consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the said shares of stock described in the statute, the result of which is to discriminate against, to impose a tax upon and to infringe the immunity from state taxation of the said United States [fol. 325] securities, Philippine Islands Bonds, Joint Stock Land Bank Bonds and to discriminate against and impose a tax upon the said shares of stock described in the statute. Such construction and application of the statute by the court violates Section 1 of Article IX and Section 1 of Article II of the Constitution of Pennsylvania, Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of Section 8 of Article I of the Constitution of the United States by discriminating

against the petitioner and its shareholders by reason of its ownership of the said securities, bonds and shares of stock and by depriving the petitioner and its shareholders of their property without due process of law and impairing the power of the Congress of the United States to borrow money on the credit of the United States because under the settlement of the tax and the judgment entered against the petitioner the amount of the tax settled against it was increased by reason of its ownership of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and exempt shares of stock by denying to the petitioner and its shareholders the equal protection of the laws and discriminating against such non-taxable assets and against it, the petitioner, and its shareholders because of its ownership of such assets, the said court having allowed in settlements made in the cases of some trust companies which were subject to the said state statute a deduction from the value of the net assets of the full value of the shares of stock described in the statute, the full value of United States securities and obligations of federal agencies and instrumentalities and national bank shares and shares of stock of Federal Reserve Banks in order to determine the taxable value to which the rate of tax was applied, whereas, under the method of settlement and calculation of the tax applied to the petitioner no such "flat" deduction was allowed of the said exempt and non-taxable [fol. 326] assets owned by the petitioner consisting of United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and exempt shares of stock described in the statute. The necessary effect and consequence of such construction of the statute and such method of settlement and calculation of the tax is that no tax is imposed in the case of trust companies the assets of which consist solely of such exempt and non-taxable shares of stock or securities and tax is imposed in cases of trust companies if any of their assets consist of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and settlement is made by allowing "proportionate" instead of "[redacted]" deductions, tax liability being determined not only by the kind of assets owned by each trust company without regard to the value of the shares of stock issued by the trust company and the value of the shareholders' interest in such shares of stock but also by

whether or not a "flat" or a "proportionate" deduction of the exempt and non-taxable assets is allowed.

10. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that it has been held to impose a tax upon the shares of stock issued by the petitioner and other trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the state of Pennsylvania, in such shares and that such tax was imposed by the method of settlement which was applied in the settlement of the tax made against the petitioner wherein and whereby the amount of the tax required to be paid is determined by the application of the rate of tax to a value of assets determined by deducting from the value of the total assets of [fol. 327] the trust company the amount of its liabilities, the full value of national bank shares and Federal Reserve Bank stock and a portion of the value of a class of assets owned by the trust company and described in and expressly exempted by the statute as shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of a capital stock tax or tax on shares, and a portion of the value of the non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by the petitioner, which portion so to be deducted is such portion of the value of such shares of stock, securities and bonds as is determined by the use of a formula consisting of a fraction the numerator of which consists of the amount of the capital stock paid in, surplus and undivided profits determined by book values less the book value of those investments, if any, for which a full deduction has been made and the denominator of which consists of the book value of the permanent investments less the book value of those investments, if any, for which a full deduction has been made; which fraction is to be multiplied by a multiplicand consisting of the book value of the shares of stock, securities and bonds which are to be apportioned and the result thus obtained is increased or diminished by the amount of appreciation or depreciation in the shares of stock, securities and bonds thus apportioned. The result of such

method of settlement of the tax affirmed by the said court is to discriminate against and to impose a tax upon the said shares of stock described in and expressly exempted from tax by the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and upon all other assets of the trust company not deducted at their full value from the value of the net assets, among which in the case of the petitioner were United States securities, Philippine Islands bonds, Joint Stock Land Bank [fol. 328] bonds and such exempt shares of stock described in and expressly exempted by the statute which were included in the value of the petitioner's total assets at the value of $286,994, and under the method of settlement applied and the judgment entered against the petitioner there was a deduction of only 19 per centum of such value, to wit, a deduction in the amount of $55,541, whereby there was a violation of Section 1 of Article IX of the Constitution of Pennsylvania, the United States statutes recited in the Assignments of Error and whereby the petitioner and its shareholders were deprived of their property without due process of law and have had denied to them the equal protection of the laws and the power of Congress of the United States to borrow money on the credit of the United States was impaired in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Clause 2 of Section 8 of Article I of the Constitution of the United States.

11. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania aproved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schulykill Trust Company, is unconstitutional and void in that under its authority the said court approved a tax settlement against the petitioner wherein and whereby the amount of tax required to be paid is increased by reason and on account of the petitioner's ownership of non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and the amount of the tax is lessened in the cases of all other trust companies in proportion as such other trust companies invested in shares of stock described in the said statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of a capi-

tal stock tax or tax on shares, Federal Reserve Bank shares, [fol. 329] National Bank shares and other assets held to be deductible "flat," i. e. at their full value, from the net assets in order to determine the taxable value and consequent tax liability, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United Staes by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws, Clause 2 of Section 8 of Article I of the Constitution of the United States by impairing the power of Congress of the United States to borrow money on the credit of the United States and the decisions of the Supreme Court of the United States in the cases of Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, 296 U. S. 113 (1935), Missouri v. Gehner, 281 U. S. 313 (1930), MacAllen Co. v. Mass., 279 U. S. 620 (1929) and Bank of California v. Richardson, 248 U. S. 476 (1919).

12. The Supreme Court of the state of Pennsylvania erred in that having held that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, authorized the deduction of assets consisting of shares of stock of Federal Reserve Banks and National Banks "flat", i. e. at their full value, from the amount of capital stock paid in, the surplus and undivided profits (the value of the net assets) irrespective of whether or not such shares of stock were purchased out of the amount of capital stock paid in, the surplus and undivided profits, and in the tax settlement made against the petitioner upon which it based such judgment having made such "flat" deduction of Philadelphia National Bank shares owned by the petitioner of the value of $20,202 from the amount of the capital stock paid in, the surplus and [fol. 330] undivided profits irrespective of whether or not they were purchased out of the amount of capital stock paid in, the surplus and undivided profits, the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock exempted from tax and described in the statute and owned by the petitioner of the value of $286,994 were not in like manner deducted "flat", and as a consequence the said judgment discriminated against the petitioner and the said Act of April 25, 1929,

Pamphlet Laws 673, which was held to authorize the entry of such judgment discriminates against the petitioner and all trust companies which own similar assets and are denied "flat" deductions from net assets in violation of Section 1 of Article IX of the Constitution of Pennsylvania which requires that "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws" and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

13. The Supreme Court of the state of Pennsylvania erred in that the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment against the Schuylkill Trust Company, is unconstitutional and void in that as held by the said court it imposes a tax upon the shares of stock issued by the petitioner and other domestic trust companies as shares and upon the interest of the shareholders, both residents and non-residents of the state of Pennsylvania, in such shares, and thereby imposes a tax upon the property of such shareholders of the petitioner who were non-residents of the state and upon their prop- [fol. 331] erty which was situate outside the state in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

14. The Supreme Court of the state of Pennsylvania erred in that the judgment which it entered against the Schuylkill Trust Company was determined in amount by a method of settlement which differs from the method of settlement which was applied to other trust companies for the same and other tax years under authority of the Act of April 25, 1929, Pamphlet Laws 673, and in the cases of the Provident Trust Company, 40 Dauphin Co. Repts. 146; 41 Dauphin Co. Repts. 1; 319 Pa. 385; and the Girard Trust Company, 42 Dauphin Co. Repts. 297, affirmed by the Supreme Court of Pennsylvania, — Pa. —; thereby discriminating against the petitioner and its shareholders in violation of Section 1 of Article IX of the Constitution of

Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws.

15. The Supreme Court of the state of Pennsylvania erred in that the final judgment which it entered against the Schuylkill Trust Company violates the opinion, judgment and mandate of the Supreme Court of the United States entered in the instant case: Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, Supreme Court of the United States, No. 3, October Term, 1935, November 11, 1935, 296 U. S. 113, wherein and whereby the Act of Assembly of the state of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, was held unconstitutional and void.

[fol. 332] 16. The Supreme Court of the state of Pennsylvania erred in that its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County directing the entry of judgment in favor of the Commonwealth of Pennsylvania and against the petitioner, the Schuylkill Trust Company, was based upon an alleged state of facts not in evidence and differing from the facts upon which the settlement of tax was made by the state taxing officers, differing from the facts upon which the appeal from such settlement was taken to the Dauphin County Court and differing from the facts upon which the original judgments of the said court, the state Supreme Court and the Supreme Court of the United States were based thereby violating Section 1104 of the state statute of April 9, 1929, Pamphlet Laws 343 (The Fiscal Code), Section 1 of Article IX of the Constitution of the state of Pennsylvania and thereby depriving the petitioner and its shareholders of their property without due process of law and denying to them the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 333] PRAYER FOR REVERSAL

For which errors the petitioner and appellant, Schuylkill Trust Company, prays that the said judgment of the

Supreme Court of the State of Pennsylvania dated June 25, 1937, in the above entitled cause, be reversed and a judgment rendered in favor of the said appellant and for costs.

Schuylkill Trust Company, Norman S. Farquhar, President. (Corporate Seal.)

John Robert Jones, Counsel for the Appellant.

August 16, 1937.

[fol. 334] *Duly sworn to by Norman S. Farquhar. Jurat omitted in printing.*

[fols. 335-340] Opinion of the court omitted. Printed side page 266, ante.

[fols. 341-382] [File endorsement omitted.]

ORDER ALLOWING APPEAL

And Now, August 20th 1937, upon consideration of the within petition, an appeal is allowed in the within cause; bond to be filed for costs in the sum of $200.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[fol. 383] Citation, in usual form, showing service on Manuel Kraus, filed August 31, 1937, omitted in printing.

[fol. 384] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

STIPULATION AND PRAECIPE FOR TRANSCRIPT OF RECORD—Filed August 31, 1937

To the Prothonotary of the Supreme Court of Pennsylvania, Middle District:

Now, this 31 day of August, 1937, the appellant and the appellee, by their respective counsel, stipulate that the transcript of the record in the above entitled cause shall consist of the following portions of the record, and request

you to prepare said transcript and include therein the following:

1. Docket Entries in the Supreme Court of Pennsylvania.

2. Record in the Supreme Court of Pennsylvania consisting of Record of Court of Common Pleas of Dauphin County:

Docket Entries.
Appeal and Specification of Objections.
Stipulation of Facts.
Supplemental Stipulation of Facts.
Statement of Counsel.
Defendant's Requests for Conclusions of Law and Answers of the Court.
Opinion (Court of Common Pleas of Dauphin County).
Exceptions of the Schuylkill Trust Company, Defendant.
Opinion Overruling Exceptions.
[fol. 385] Supplemental Order and Final Judgment.
Opinion (Supreme Court of Pennsylvania).
Opinion (Supreme Court of the United States).
Mandate of the Supreme Court of the United States.
Remittitur.
Petition for Rule to Show Cause.
Demurrer.
Judgment.
Opinion.
Opinion (Girard Trust Company).
Exceptions of the Schuylkill Trust Company, defendant.
Exceptions of the Commonwealth.
Exceptions Overruled and Final Judgment.
Additional Exceptions of the Schuylkill Trust Company, Defendant.
Opinion Upon Exceptions.
Modified and Final Judgment.

3. Statement of Questions Involved as contained in the Brief filed in the Supreme Court of Pennsylvania by the Schuylkill Trust Company, Appellant.

4. Statement of Questions Involved as contained in the Brief filed in the Supreme Court of Pennsylvania by the Commonwealth of Pennsylvania, Appellee.

5. Assignments of Error filed in the Supreme Court of Pennsylvania by the Schuylkill Trust Company, Appellant.

6. Opinion of the Supreme Court of Pennsylvania.

7. Petition for the allowance of an appeal to the Supreme Court of the United States and order made thereon allowing the appeal.

8. The accompanying Statement as to Jurisdiction.

9. The accompanying Assignments of Error.

[fol. 386] 10. Citation on appeal.

11. Stiplation and Praecipe for Transcript of Record.

John Robert Jones, Counsel for the Appellant. Chas. J. Margiotti, Attorney General, Commonwealth of Penna., by Manuel Kraus, Deputy Atty. General, Counsel for the Appellee.

[fol. 387] [File endorsement omitted.]

[fol. 388] Chief Justice's Certificate to Prothonotary omitted in printing.

[fol. 389] Prothonotary's Certificate to Chief Justice omitted in printing.

[fol. 390] Prothonotary's certificate to foregoing transcript omitted in printing.

[fol. 391] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND THE PARTS OF THE RECORD THOUGHT NECESSARY FOR THE CONSIDERATION THEREOF—Filed September 27, 1937

To the Hon. Charles Elmore Cropley, Clerk of the Supreme Court of the United States:

Sir:

In compliance with paragraph 9 of Rule 13 of Revised Rules of the Supreme Court of the United States the appel-

lant submits the following statement of points on which the appellant intends to rely and the parts of the record which the appellant thinks necessary for the consideration thereof, together with proof of service of the same on the appellee:

I. The points on which the appellant intends intends to rely are stated in the Assignments of Error filed by the appellant with its Petition for Appeal.

II. The portions of the record thought necessary for the consideration of the above points are the portions set forth in the Stipulation and Praecipe for Transcript of Record certified on appeal to the Supreme Court of the United States.

John Robert Jones, Counsel for the Appellant.

[fols. 392-393] And Now, this 23rd day of September, 1937, service of the foregoing Statement is accepted and the receipt of a copy thereof is acknowledged for the Commonwealth of Pennsylvania, appellee.

Charles J. Margiotti, Atty General; Manuel Kraus, Deputy Attorney General, Counsel for the Commonwealth of Pennsylvania, Appellee.

[fol. 394] Served the above upon the Commonwealth of Pennsylvania, appellee, by mailing a copy thereof to Manuel Kraus, Esq., Deputy Attorney General, Department of Justice, State Capitol, Harrisburg, Pennsylvania, by first class mail September 18, 1937.

John Robert Jones, Attorney for the Appellant.

[fol. 395] [File endorsement omitted.]

Endorsed on cover: File No. 41,928. Pennsylvania Supreme Court. Term No. 447. Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania. Filed September 23, 1937. Term No. 447, O. T., 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION.

A.

Statutory Provisions Believed to Sustain Jurisdiction.

This case is reviewable by the Supreme Court of the United States on appeal under the Act of Congress of February 13, 1925, c. 229, 43 Stat. 936, Act of Congress of January 31, 1928, c. 14, 45 Stat. 54, which provides: "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal" and the Act of Congress of April 26, 1928, c. 440, 45 Stat.

466, because there was clearly drawn into question from the beginning of the litigation the validity of the Act of Assembly of the State of Pennsylvania approved April 25, 1929, Pamphlet Laws 673 and the validity of the construction and application of the said State statute to the petitioner, the Schuylkill Trust Company, on the ground that the said State statute and the construction and application of the said State statute in the tax settlement made against the petitioner and embodied in the judgment entered against it by the Court of Common Pleas of Dauphin County affirmed by the final judgment of the Supreme Court of the State of Pennsylvania was repugnant to Section 3701 Revised Statutes of the United States, 31 U. S. C. Section 742, Act of Congress of August 29, 1916, c. 416, 39 Stat. 548, Sec. 11, Act of Congress of July 21, 1921, c. 51, 42 Stat. 145, Act of Congress of July 17, 1916, c. 245, 39 Stat 360, *et seq.*, Sec. 16, Sec. 26, Section 5219 Revised Statutes of the United States, Clause 2, Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decision of the Supreme Court of Pennsylvania and its judgment rendered thereon against the petitioner was in favor of the validity of the said statute of the State.

B.

Statute of the State of Pennsylvania Validity of Which is Involved.

The State statute, the validity of which is involved is the Act of Assembly of Pennsylvania of June 13, 1907, Pamphlet Laws 640, as amended by the Act of Assembly of Pennsylvania of July 11, 1923, Pamphlet Laws 1071, as amended by the Act of Assembly of Pennsylvania of May 7, 1927, Pamphlet Laws 853, as amended by the Act of

Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673. The pertinent provisions of the said Act of April 25, 1929, Pamphlet Laws 673, are:

"AN ACT

"To amend further an act, approved the thirteenth day of June, *Anno Domini* one thousand nine hundred and seven (Pamphlet Laws, six hundred and forty), entitled '* * * ,' by modifying the procedure for the settlement and payment of the State tax on the stock of title insurance and trust companies."

"SECTION 1. Be it enacted, &c., That * * * is hereby further amended to read as follows:

"SECTION 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances; and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled 'An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto,' approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance or trust companies, shall, on or before the (* * *) *fifteenth* day of (* * *) *March* in each and every year, make to the (* * *) *Department of Revenue* a report in writing, (* * *) setting forth the full

number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof as of December thirty-first preceding, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the (* * *) *Department of Revenue* to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. (* * *) It shall be the duty of every such company, within a period of sixty days after the date of such settlement by the Auditor General, at its option, to pay the amount of said tax to the State Treasurer, *through the Department of Revenue,* from its general fund, or collect the same from its shareholders and pay over to the State Treasurer *through the Department of Revenue:* Provided (* * *) That upon the payment of the tax fixed by this act into the State Treasury, through the Department of Revenue, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth. *The procedure in case the Department of Revenue be not satisfied with the report made by any title insurance or trust company, and the penalties for failing to make such report and pay the tax, shall be as provided by law.*

"Section 2. This act shall become effective on the first day of July, one thousand nine hundred and twenty-nine.

"Approved—The 25th day of April, A. D. 1929.

"John S. Fisher."

C.

Date of Judgment, etc.

The date of the judgment sought to be reviewed is June 25, 1937, and the date upon which the petition for reargument was refused by the Supreme Court of the State of Pennsylvania was July 7, 1937, notice of which refusal was given to the petitioner July 12, 1937.

D.

The Nature of the Case and Ruling Below.

The petitioner was the appellant and the Commonwealth of Pennsylvania was the appellee in the appeal to the Supreme Court of Pennsylvania, which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County making a settlement of tax against the petitioner for the tax and calendar year ending December 31, 1930, fixing the liability of the petitioner for a tax in the amount of $1,441.39 under the alleged authority of an Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, Laws of Pennsylvania, 1929.

The petitioner, Schuylkill Trust Company, a domestic corporation, to which letters patent were issued upon October 17, 1887, filed its report for the twelve months ending December 31, 1930, in the Department of Revenue as required by the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673, and that thereupon the Department of Revenue made a settlement of tax against the said petitioner under the alleged authority of the said Act of Assembly in the amount of $2,306.08 upon January 25, 1932, which was approved by the Department of the Auditor General January 26, 1932.

Subsequent thereto and in due course a petition for resettlement was filed which was refused by the said Departments of Revenue and of the Auditor General. Thereupon a petition for review was filed with the Board of Finance and Revenue, which Board made a resettlement of the said tax under the alleged authority of the said act upon January 26, 1933, whereby tax was imposed in the amount of $2,290.14, from which resettlement the petitioner took an appeal to the Court of Common Pleas of Dauphin County.

Hearing was had in the said Court of Common Pleas of Dauphin County upon the said appeal upon an agreed statement of facts and after argument, said court upon October 19, 1933, affirmed the settlement of tax made by the Board of Finance and Revenue and directed the entry of judgment *nisi* in the amount of $1,719.71, together with costs and Attorney General's Commission thereon in a total amount of $1,863.17, which judgment was made absolute November 24, 1933 (R. 4a-18a, 18a-24a, 85a-103a, 105a).

Thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania, which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County. That upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania, which court upon June 30, 1934, filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Chief Justice Frazer.[1]

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, your petitioner filed its petition for reargu-

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[1] *Commonwealth of Pennsylvania* v. *Schuylkill Trust Co., Appellant,* Supreme Court of Pennsylvania, Middle District, No. 19, May Term, 1934 (Opinion, R. 106a).

ment July 21, 1934, which was denied by the said court upon September 25, 1934. Your petitioner thereupon, to wit, November 26, 1934, presented to the Supreme Court of Pennsylvania its petition for the allowance of an Appeal to the Supreme Court of the United States, which was refused by the Supreme Court of Pennsylvania November 28, 1934.

Subsequent thereto and in due course your petitioner presented its petition for the allowance of an appeal to the Supreme Court of the United States which was allowed December 14, 1934, by Roberts, Associate Justice, Supreme Court of the United States. (*Schuylkill Trust Company, Appellant*, v. *The Commonwealth of Pennsylvania*, Supreme Court of the United States, No. 3, October Term, 1935 (296 U. S. 113) (Opinion, R. 110a).)

The appeal was heard before the Supreme Court of the United States and upon November 11, 1935, the opinion of the said court was delivered and filed wherein and whereby the judgment of the State court was reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States (296 U. S. 113). The judgment of the State court was reversed because it was based upon the Act of April 25, 1929, Pamphlet Laws 673, which was discriminatory in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and United States Revised Statutes, Section 5219, and the United States statutes recited in the assignments of error.

Upon February 11, 1936, the Commonwealth of Pennsylvania presented a petition to the Court of Common Pleas of Dauphin County praying the court to revise its original judgment entered November 24, 1933, which had been affirmed by the State Supreme Court June 30, 1934, and reversed by the Supreme Court of the United States November 11, 1935, by entering judgment in favor of the Common-

wealth and against this petitioner in the amount of $2,334.57 for tax imposed upon the full actual net asset value of the shares of stock of the petitioner under authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, and that such court issue a rule upon this petitioner to show cause why such judgment should not be entered. February 11, 1936, the court issued a rule upon this petitioner to show cause why the judgment prayed for should not be entered.

To such rule so made by the Dauphin County Court the petitioner filed a demurrer praying the judgment of the court whether it should be required to make any answer to the petition and that it be hence dismissed with its reasonable costs in this behalf sustained. The causes of demurrer are fully set forth in the demurrer. The grounds thereof were, *inter alia*, that the Commonwealth was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement or to make a tax settlement under the Act of June 13, 1907, Pamphlet Laws 640, there being no such law in force in the State of Pennsylvania either at the time of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petition prayed that such settlement be made, and that the same constitutional defects which the Commonwealth admitted made void the Acts of April 25, 1929, Pamphlet Laws 673, May 7, 1927, Pamphlet Laws 853, and July 11, 1923, Pamphlet Laws 1071, made invalid and void the Act of June 13, 1907, Pamphlet Laws 640 (R. 136a).

Oral argument was had upon the petition and demurrer. The Commonwealth contended that the Act of April 25, 1929, Pamphlet Laws 673, was unconstitutional and void and had been so held by the Supreme Court of the United States and that the prior acts of May 7, 1927, *supra*, and July 11, 1923, *supra*, were likewise unconstitutional and void and that therefore a revision of the judgment should be made by the

entry of judgment against the Schuylkill Trust Company under the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, by denying all deductions. The petitioner contended that judgment should be entered in its favor together with costs. The Dauphin County Court overruled the demurrer filed by the petitioner, without opportunity to file an answer to the petition, by such court's entering a judgment *nisi* upon April 20, 1936, imposing a tax together with interest and Attorney General's Commission in the amount of $1,801.03 less costs expended in the Federal Court and allowed by said court in the amount of $344, the total judgment entered being $1,457.03 (R. 152a). The judgment was based upon the same Act of April 25, 1929, Pamphlet Laws 673, after the court had amended it by allowing deductions in addition to those written in the statute by the legislature.

Thereafter in due course the petitioner filed exceptions to the conclusions of law and judgment of the court, there being no dispute as to the facts which were set forth in the stipulations of facts filed at the time of the trial of the cause and before the entry of the original judgment dated November 24, 1933 (R. 105a) (Exceptions, R. 183a-208a, 217a, 218a).

January 18, 1937, the Dauphin County Court filed an opinion entitled "Opinion Upon Exceptions" wherein it states that it considered certain exceptions filed, that it had sustained some ~~and~~ overruled and modified others and thereupon proceeded to enter a new and differently formulated and calculated judgment in the amount of $1,719.45, from which was deducted the hereinbefore referred to amount of costs in the sum of $344, the judgment entered being $1,375.45. The new formula and calculation were compounded of values, some stated to be "book value" and some "market value", a compound of figures and facts not in evidence and not included in the stipulation of facts. The

court in its opinion admits that its new and differing judgment is founded upon facts other than those upon which the tax settlement and the judgments of the State and Federal courts were founded.

Subsequent thereto, finding that it had not ruled upon all of the exceptions, the court, upon January 22, 1937, filed another opinion entitled "Modified Judgment" wherein it is stated that the additional exceptions were overruled and proceeded to set forth the grounds of its final judgment which it entered upon such date, the judgment in this opinion being the sum of $1,441.39 which was the amount of the tax, interest and Attorney General's commission, $1,785.39, less the hereinbefore referred to Federal court costs of $344. The formula and calculation upon which this new judgment was based are a compound of facts not in evidence as was the basis of the earlier judgment directed to be entered January 18, 1937 (R. 221a, 222a).

Thereupon and in due course the petitioner took an appeal to the Supreme Court of Pennsylvania which is the highest and the court of last resort of said State, from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 25, 1937, filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Justice Stern.

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, your petitioner filed its petition for reargument July 2, 1937, and upon July 12, 1937, your petitioner was notified that reargument had been refused July 7, 1937.

The settlement of tax made by the Court of Common Pleas of Dauphin County under the alleged authority of

the said State statute of April 25, 1929, Pamphlet Laws 673, and the mandate of the Supreme Court of the United States issued in the case of *Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* No. 3, October Term, 1935, 296 U. S. 113, which settlement of tax was embodied by the said court in a judgment entered against your petitioner January 22, 1937, which judgment was affirmed by the Supreme Court of Pennsylvania June 25, 1937, was made in accordance with the following method and calculation:

"Statement"

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$446,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171"

(Manifestly the term, "Total", should be Taxable.)

The tax was calculated upon the said amount of $391,171 at the rate of five mills with a resultant tax in the amount of $1,955.85 upon which credit was given for a payment on account of $570.43, leaving a balance due the Commonwealth in the amount of $1,385.42 (R. 221a).

Upon such amount of $1,385.42 interest was calculated from April 8, 1933, to January 22, 1937, in the amount of $314.95, making a total of $1,700.37. Attorney General's commission was calculated upon the said sum of $1,700.37 in the amount of $85.02, making a total of $1,785.39. From this sum so claimed to be due in the amount of $1,785.39 there was deducted:

> "Less Costs allowed appellant in the Mandate of the Supreme Court of the United States, 344.00,"

leaving a balance of $1,441.39, which was the amount of the final judgment directed to be entered by the Dauphin County Court January 22, 1937 (R. 223a).

In order that the meaning, intent and effect of this method of calculation applied and embodied in the final judgment of January 22, 1937, and its relationship to the prior judgments entered by the same court in this same case embodying differing methods of settlement and calculations may be made clear, they will be set forth in the order of their sequence:

The method of settlement applied by the taxing officials and affirmed by the original judgment of the Dauphin County Court entered November 24, 1933, and affirmed by the Supreme Court of Pennsylvania June 30, 1934, is set forth in the stipulation of facts (R. 19a). This method of settlement and the judgment consequent upon its application was considered by the Supreme Court of the United States and held void, for the reason that such court held the statute under authority of which it was applied discriminatory and void. By this method of settlement, formula and calculation the taxing officials of the Commonwealth of Pennsylvania determined the actual value of each and all of the assets of the petitioner. They determined the actual value of the amount of capital stock paid in, the surplus and undivided profits of the petitioner,

which was the actual value of the net assets of the petitioner and was the difference between the actual value of the total assets and the amount of the liabilities. The actual value of the total assets was fixed at $3,755,882. The actual value of the amount of the capital stock paid in, the surplus and the undivided profits was fixed at $466,914. Included among the total assets were shares of stock issued by corporations which, under the express language of the statute, were exempted from the tax imposed. These shares of stock are described and classified in the statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares. All of the shares of stock included within such class of shares exempted by the State statute were valued at $155,989, included within which class were Philadelphia National Bank shares of the value of $20,202. These shares are listed in Exhibit "2" which was made a part of Specification of Objection 7 in the appeal taken to the trial court and are listed also in the stipulation of facts filed with such court (R. 10a, 14a, 15a, 22).

The taxing officials then determined the value at which these exempt shares of stock of the actual value of $155,989 were taxed or relieved from tax or the capital stock of the corporations which issued them were taxed or relieved from tax under other taxing statutes of the State and fixed such value at $71,373, included within which were the said Philadelphia National Bank shares (R. 13a, 14a, 23a, 30a). They held that these shares of stock of the actual value of $155,989 were to be deducted from the amount of the capital stock paid in, the surplus and undivided profits at such portion of the said $71,373, as the amount of the capital stock paid in, the surplus and undivided profits bore to the value of the total assets and by such method fixed the amount of

such deduction to be $8,886. The view of the taxing officials and the State courts was that the purpose of the exemption of such shares of stock under the language of the statute was to avoid double taxation (R. 80a, 84a) and therefore since such shares of stock of the actual value of $155,989 had either been taxed or relieved from tax under other taxing statutes of the State or the corporations which issued them had been taxed or relieved from tax upon their capital stock under other taxing statutes of the State, the petitioner was not entitled to a deduction of the full value of these shares in the amount of $155,989. Thus did the State courts in their affirmation of the tax settlement and their construction and application of the State statute deny the claim of the petitioner for the deduction of the whole actual value of the Philadelphia National Bank shares in the amount of $20,202 and the whole actual value of other tax-fre shares in the total amount of $155,989.

The calculation in application of the theory of the taxing officials of the Commonwealth of Pennsylvania construing and applying the statute is set forth in the Stipulation of Facts (R. 18a) and is as follows:

$$441{,}668 + 25{,}247 - \left(\frac{467{,}714}{3{,}755{,}882} \times 71{,}373\right) = 458{,}028.$$

This calculation consists of the following elements: The sum, 441,667 + 25,247 or 466,914, was the actual value of the amount of the capital stock paid in, the surplus and undivided profits. From this sum of 466,914 was deducted the result of the calculation within the brackets, 8,886, with a resultant taxable value of 458,028. The numerator of the fraction, 467,714, is the amount of capital stock paid in, the surplus and undivided profits. (There was a mistake in addition. The numerator 467,714, should have been 466,914. See Stipulation of Facts, R. 21a; Statement of

Counsel for the Commonwealth, (R. 29a, 30a). The denominator of the fraction, $3,755,882, is the value of the total assets. The multiplicand, $71,373, is the taxed and exempt value of the tax-free shares of the actual value of $155,989, determined by the taxing officials as hereinbefore set forth. The portion of the said 71,373 subtracted as the result of the method of settlement and calculation was 8,886 and resulted in the sum of $458,028 which was held to be the taxable value. The rate of tax, five mills, was thereupon applied to the said sum of $458,028 with a resultant tax settled against the petitioner in the amount of $2,290.14.

There were included within the total assets of the petitioner of the value of $3,755,882 national bank shares of the value of $20,202 which were included also within the class of exempt assets tax free under the statute of the whole actual value of $155,989 (R. 10a, 15a, 22a).

The only deductions allowed under the tax settlement made as the statute was construed and applied by the taxing officials and State courts were a deduction of the amount of the liabilities from the amount of the total assets which resulted in a fixing of the amount of the capital stock paid in, the surplus and undivided profits at $466,914 and a deduction from this latter sum of the said sum of $8,886, whereby a taxable value was determined in the amount of $458,028. The deduction of the full value of the said described shares of stock ($155,989) was not allowed. The deduction allowed by reason of their ownership was $8,886, which is 5.6 per centum of their whole value. There was no deduction of the full value of national bank shares of the value of $20,202, which was included and listed in the said class of shares (R. 10a, 14a, 15a, 22a). The only deduction allowed was such portion of the said $20,202 as the amount of capital stock paid in, the surplus and undivided profits

bore to the total assets, to wit, a deduction of $2,515, $\left\{\frac{467,714}{3,755,882} \times 20,202 = 2515\right\}$, which 12.4 per centum of their whole actual value.

Among the total assets of the petitioner of the value of $3,755,882 were United States securities of the value of $134,907, Philippine Islands bonds of the value of $10,900 and Joint Stock Land Bank bonds of the value of $5,400. No deduction whatsoever was allowed by reason of the petitioner's ownership of these assets.

The State courts in affirming the settlement made by the taxing officials held that the shares of stock to be deducted under the express language of the statute were to be deducted to the extent of such portion of their value which was taxed or exempted from tax under other State taxing statutes (in the instant case, $71,373) as the amount of the capital stock paid in, the surplus and undivided profits bore to the total assets (in the instant case in the amount of $8,886) for the reason, said the trial court, that under the statute "The sole purpose of this exemption clause was to avoid double taxation" (R. 80a, 84a). The State courts construed and applied the statute as directing the deduction of $8,886, 5.6 per centum of the whole actual value ($155,989) of certain assets in order not to tax such portion twice, thereby construing and applying the statute as imposing a tax upon all assets not deducted, it being self-evident that if $8,886 of the value of assets were to be deducted in order to avoid double taxation, such assets as were not deducted were, in the opinion of the State courts, to be taxed once and that such was the intent and purpose of the statute. Hence it is that the State courts construed and applied the statute as imposing a tax upon the assets

of the trust company less certain prescribed deductions and determined the amount of the tax liability by reason and on account of the kind of assets owned by the trust company and not upon the shareholders' interest in the shares of stock issued by the trust company.

In so holding the State courts ignored the fact that there was included within the said class of exempt shares of stock the national bank shares of the value of $20,202 and that the State was without authority to make such shares the basis for any other and further taxation, the petitioner being subject to tax upon such shares at their actual net asset value as the owner thereof under the Pennsylvania Act of April 25, 1929, Pamphlet Laws 677. With reference to the United States securities, the Philippine Islands bonds and the Joint Stock Land Bank bonds, the State courts admitted that they were non-taxable assets, that the State was without authority to impose a tax upon them but held that they were not taxed, for the reason that, said they, the tax imposed by the said Act of April 25, 1929, Pamphlet Laws 673, was a tax upon shares *qua* shares, a tax upon the shareholders' interest in the shares issued by the petitioner, and not a tax upon any of the assets owned by the petitioner.

The petitioner contended that the tax was not a tax upon shares as shares, that the statute expressly exempted certain assets owned by the trust company at their whole actual value and imposed the tax solely with reference to remaining assets and that therefore under the tax settlement there was not only a taxation of such non-taxable securities but also a discrimination against them, by reason of the exemption allowed to certain favored assets described in the statute. The petitioner contended that the proper method of taxation in order to construe the State statute in conformity with the Acts of Congress and the Constitution of Pennsylvania and of the United States and thus

carry out the intent of the State legislature was to determine the taxable value to which the rate of tax was to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares, and the full value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, and that when such method is applied the amount of the tax is $570.43, which the petitioner paid (see Defendant's Request for Conclusion of Law 18, R. 43a, 24a). The petitioner contended also that, in addition to the fact that the statute as written and construed and applied to it imposed a tax upon assets, such statute as construed and applied to it discriminated against the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds because they were not deducted and eliminated from consideration at their full actual value, although there was a deduction made of a portion of the value of the tax-free shares of stock exempted under the express language of the statute and that consequently the immunity of such United States securities and such bonds and Federal instrumentalities was infringed and that the national bank shares being subject to tax under the Pennsylvania statute of April 25, 1929, Pamphlet Laws 677, could not be made the basis of any other or further taxation and therefore must of necessity be deducted at their full value and eliminated entirely from consideration in determining any tax imposed under the Act of April 25, 1929, Pamphlet Laws 673, the statute under consideration in the instant case.

Though the State Supreme Court affirmed the judgment of the trial court and held, upon authority of its earlier decision in the case of *Commonwealth* v. *Hazelwood Savings & Trust Co.*, 271 Pa. 375 (1921), construing and apply-

ing the Act of June 13, 1907, Pamphlet Laws 640, that the petitioner was not entitled to a deduction of the whole value of the shares of stock ($155,989) made tax-free under the express language of the Act of April 25, 1929, Pamphlet Laws 673, and thus denied, in its construction and application of the said Act of 1929, *supra*, the claim of the petitioner for the deduction of the full value of the national bank shares ($20,202) owned by it, the Supreme Court said that the question as to the claim and right of the petitioner for the deduction of the whole value of the national bank shares was not raised in the original specification of objections filed with the trial court, was not discussed by the trial court and therefore would not be considered by it. This statement and conclusion of the State Supreme Court was erroneous and was so held by the Supreme Court of the United States (296 U. S. 113). The United States Supreme Court held that the question was properly raised [2] in the State courts and in the Federal court, that the national bank shares as well as the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds were discriminated against the subjected to tax, that they were included in the measure of the tax and that therefore the statute was discriminatory in violation of the United States statutes recited in the assignments of error and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The State Supreme Court in its opinion filed in support of its last judgment does not hold that this question was not properly raised by the petitioner and the appellant in the State courts. The ruling of the

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[2] See Assignments of Error and Statement of Questions Involved filed in the Supreme Court of Pennsylvania (Supreme Court of Pennsylvania, Middle District, No. 19, May Term, 1934), printed in Transcript of Record, Supreme Court of the United States, October Term, 1935, No. 3, pp. 72-90.

United States Supreme Court upon this point being set forth at length in the opinion filed, the contentions of the petitioner with reference thereto are not repeated herein.

Having held that the tax imposed by the said Act of 1929 was a tax upon the shares of stock issued by the petitioner *qua* shares and that it was a tax upon the shareholders' interest in such shares, the State courts held that such tax was imposed upon shares owned by non-residents and their interest as well as those owned by residents of the State. The petitioner contended that if the tax was a tax upon shares *qua* shares and upon the shareholders' interest in the shares, the State of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the *situs* of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in the case of *Corry* v. *Baltimore*, 196 U. S. 466 (1905), did not support the conclusion of the State courts, the petitioner having been incorporated under the laws of Pennsylvania October 17, 1887, (R. 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this State the *situs* for the taxation of shares of stock owned by non-residents, the law of the State as declared by the Supreme Court being to the contrary. (*Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case is an amendment, was construed by the

Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied (*Commonwealth* v. *Mortgage Trust Company*, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the Supreme Court of the United States in the cited case of *Corry* v. *Baltimore, supra*, there was no authority in the State to impose a tax upon the shares owned by non-residents.

Subsequent to the issuing of the mandate of the Supreme Court of the United States the Dauphin County Court directed the entry of a judgment against your petitioner in the amount of $1457.03 upon April 20, 1936, which it held was entered in compliance with such mandate (R. 152a). The amount of such judgment, it was said, was determined in accordance with the method of settlement set forth in the judgment itself which was an erroneous application of the principles set forth in its opinion.

The Dauphin County Court held that the statute was unconstitutional and void as it had been applied theretofore but that it had the power to allow additional deductions which the State Supreme Court had theretofore held the Legislature did not intend to allow and had not allowed by this statute. The Dauphin County Court held also that by allowing such additional deductions in the manner in which it was allowing them in the instant case not only was the statute made constitutional but there was also a compliance with the mandate of the Supreme Court of the United States.

The Dauphin County Court held that the statute was to be applied by the application of the following method of settlement:

(1) That the full market value, that is, the actual value of national bank shares and Federal Reserve Bank shares

was to be deducted from the amount of capital stock paid in, surplus and undivided profits (the net assets) in all cases, irrespective of whether or not they were investments of the amount of capital stock paid in, surplus and undivided profits.

(2) That neither the shares of stock defined in the said statute and exempted from tax by the language of such statute nor the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and other obligations of the United States Government and its agencies and instrumentalities were to be deducted from the amount of capital stock paid in, surplus and undivided profits at their full actual value unless the trust company-owner of such assets established as a fact that they were wholly investments of the amount of capital stock paid in, surplus and undivided profits, that if it were not shown that they were wholly such investments, then in the case of such assets, the court said, "a proportionate deduction is to be made."

(3) That the proportionate deduction was to be made according to the following formula (R., 150a, 151a):

> "(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

(4) That in the case of your petitioner, since it owned Philadelphia National Bank shares of the value of $20,202,

the full value thereof was to be deducted, though it had not been shown that the national bank shares were wholly investments of capital stock paid in, surplus and undivided profits, and that, since the petitioner had not shown that United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of an actual value of $151,207 and the shares of stock defined and exempted by the language of the statute exclusive of the said national bank shares of an actual value of $135,787 were purchased, were wholly investments of the amount of capital stock paid in, surplus and undivided profits, a proportionate deduction was to be made in the manner outlined.

At this point the Dauphin County Court was confronted with the fact that this method of settlement could not be applied to the petitioner because there was nothing in the record to show book values of assets, what was meant by book values, what was meant by permanent investments and what the permanent investments owned by the petitioner were and their book value was. Nevertheless the Dauphin County Court proceeded as the statement of the calculation of its judgment shows in the record (R. 152a). It applied the actual values of each and all assets though its formula outlined in its opinion was to the contrary. The judgment calculated was not determined in conformity with the method of settlement which the court approved and which it held complied with the mandate of the Supreme Court of the United States. It fixed the actual value of the amount of capital stock, surplus and undivided profits at $466,914; it deducted the actual value of the national bank shares in the amount of $20,202; it allowed a deduction of a portion of the actual value of the United States securities and a portion of the actual value of the remaining exempt shares of stock of a total value of $286,994 in the amount of $34,318

(R. 152a). It arrived at such sum of $34,318 by the application of the following fraction:

$$\frac{446,712}{3,735,680} \times 286,944.$$

The numerator of the fraction, $446,712, is the actual value of the amount of capital stock paid in, surplus and undivided profits, $466,914, minus the value of the national bank shares, $20,202.

The denominator of the fraction, $3,735,680, is the actual value of all the assets as shown in the stipulation of facts (R. 19a), $3,755,882, less the actual value of the national bank shares, $20,202.

The multiplicand of the fraction, $286,944 (should be $286,994, see R. 102a), is the actual value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, $151,207, plus the actual value of the shares of stock defined in the statute, $155,989, exclusive of the actual value of the national bank shares (R. 22a) which had been deducted at their actual value of $20,202.

As the result of the foregoing there was deducted from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the full actual value of the national bank shares, $20,202, and the sum of $34,318 which was a portion of the actual value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the exempt shares of stock defined and exempted by the language of the statute exclusive of the actual value of the national bank shares of a total value of $286,994, the total deduction being $54,520, making the taxable value of the capital stock $412,394, with a resultant tax in the amount of $2,061.97 (see R. 152a).

Thereafter the court, seeing that it had determined a judgment by a method of calculation which did not apply

the method of settlement which it had held in its opinion was a constitutional interpretation, construction and application of the statute and a compliance with the mandate of the Supreme Court of the United States and finding that there was no evidence of record as to book value of assets of the petitioner, no evidence as to what constituted permanent investments, what the permanent investments were which were owned by the petitioner and what the book values of permanent investments were (see Stipulation of Facts and Supplemental Stipulation of Facts, R. 18a-24a), proceeded to change the valuations set forth in the method of calculation whereby it had in its prior judgment of April 20, 1936, determined the amount of the proportionate deduction for the exempt shares of stock defined in the language of the statute and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds (see Opinion, R. 219a-222a). The court changed the numerator of the fraction from $446,712 to $418,650, which latter sum it says in its opinion "is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042, total $441,667, which are the book values less the book values of National Bank Shares, $23,017, making $418,650" (R. 219a). The court changed the denominator of the fraction from $3,735,680 to $2,158,045, which it says in its opinion (R. 220a) is "the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made." The court said "that the permanent investments amount of $2,181,062, and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045." The court changed the multiplicand, $286 44 ($286,994) to $286,121. The court said (R. 220a), "Instead of the multiplicand used by us, $286,994, the correct multiplicand is $286,121. This error is accounted for by the fact that the tax value of the Pennsyl-

vania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994."

After having made such alterations in the figures applying its formula the court proceeded to add the sum of $35, which latter sum it says is the "appreciation which should be added to the result of the fraction * * *." As a result of the foregoing the proportionate deduction calculation becomes (R. 220a):

$$\frac{418,650}{2,158,045} \times 286,121 + 35 = 55,541.$$

The first fact to be noted is that there is no evidence whatsoever upon which to base any of the figures embodied within this new proportionate method of calculation. There were no such facts or factors as book values of assets of the petitioner, what constituted permanent investments, what the permanent investments of the petitioner were, if any there were, what their book or actual value was, considered by the taxing officers who made the tax settlement against your petitioner. This is demonstrated by the record itself and is admitted by the Dauphin County Court and the State Supreme Court in the opinions filed in the case of *Commonwealth* v. *Provident Trust Company of Philadelphia*, 40 Dauphin Co. Repts. 146, 41 Dauphin Co. Repts. 1, 319 Pa. 385, in which case it was said that in the year 1930, the year here in question, all settlements and methods of settlement and calculations were based upon actual values (40 Dauphin, *supra*, 169). There were no such facts or factors before the Dauphin County Court in the trial of this case and the entry of its original judgment,

before the Supreme Court of the State of Pennsylvania when it entered its final judgment June 30, 1934, or before the Supreme Court of the United States. Not only was there no such evidence but there was no hearing nor an opportunity for a hearing given the petitioner upon such matter. The truth of these statements is established by the opinions of the court itself which appear of record (R. 145a, 219a).

As shown, the application of the new calculation fixes a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a portion of the value of the shares of stock exempted under the statute, exclusive of the national bank shares, of the total value of $286,994 at $55,541. Accordingly the Dauphin County Court upon January 18, 1937, applied its new calculation (R. 221a, 222a) and as a result thereof there was deduction from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914, the actual value of the national bank shares, $20,202, the recited proportionate deduction of $55,541 or a total deduction of $75,743, thereby fixing the taxable value at $391,171 with a resultant tax in the amount of $1,955.85.

Thereafter, finding that it had not ruled upon all of the exceptions filed by the petitioner, the court entered its final judgment upon January 22, 1937, in the amount of $1,441.39 (R. 222a, 223a). This final judgment differs from the judgment of $1,375.45 entered January 18, 1937, solely in the amount of the interest calculation and Attorney General's Commission. All three of the judgments entered, the judgment of April 20, 1936, the judgment of January 18, 1937, and the final judgment of January 22, 1937, allow as a deduction the costs which the mandate of the Supreme Court of the United States stated was to be paid to the petitioner in the amount of $344. These costs, as the final judgment

shows, are allowed as a deduction from a sum which includes interest calculated to January 22, 1937, as a result of which not only was a judgment entered against the petitioner for taxes but the petitioner was charged interest upon costs which were owing to it from the date of the decision of the Supreme Court of the United States, November 11, 1935, to January 22, 1937.

The Supreme Court of the State of Pennsylvania affirmed the final judgment which the lower court entered January 22, 1937, in favor of the Commonwealth and against the petitioner in the amount of $1441.39 and filed its opinion June 25, 1937. Its opinion is nothing more than an approval of everything done by the Dauphin County Court.

The Dauphin County Court and the State Supreme Court held that the tax imposed by the said statute was a tax upon the shares issued by the petitioner *qua* shares, that it was a tax upon the shareholders' interest in the shares, that it was imposed upon the shares owned by non-residents and their interest in such shares as well as those owned by the residents of the state. The petitioner contended that if the tax was a tax upon shares *qua* shares and upon the shareholders' interest in the shares, the State of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the *situs* of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The petitioner contended that the decision of the Supreme Court of the United States in the case of *Corry* v. *Baltimore*, 196 U. S. 466 (1905), did not support the conclusion of the State courts, the petitioner having been incorporated under the laws of Pennsylvania October

17, 1887 (R. 24a), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this State the *situs* for the taxation of shares of stock owned by non-residents, the law of the State as declared by the Supreme Court being to the contrary. (*Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 133 (1882).) The petitioner contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case, is an amendment, was construed by the Supreme Court of Pennsylvania, in sustaining its constitutionality as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied (*Commonwealth* v. *Mortgage Trust Company*, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the Supreme Court of the United States in the cited case of *Corry* v. *Baltimore, supra*, there was no authority in the State to impose a tax upon the shares owned by non-residents.

The petitioner also contended that the Supreme Court of the United States in its decision filed November 11, 1935, had held that none of the shares of stock issued by your petitioner was taxable for the reason that the State statute of 1929 was discriminatory and therefore unconstitutional and void and that it had so declared in its opinion.

The sole difference between the original judgment entered by the Dauphin County Court November 24, 1933, affirmed by the opinion and judgment of the State Supreme Court June 30, 1934, from which judgment the appeal was taken to the Supreme Court of the United States, and this latest judgment of the State Supreme Court which is said to be a compliance with the mandate of the Supreme Court of the United States is an increase in the amount of the deductions

allowed by reason of the petitioner's ownership of national bank shares, United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, the deduction allowed being a deduction of the full value of the national bank shares and a deduction of a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute, such portion being 19 per centum of their entire value.

The State courts now hold that the statute as it is now construed and applied in the tax settlement embodied in the judgment entered against the petitioner is constitutional and complies with the mandate of the Supreme Court of the United States. The State courts adhere to the conclusion that under the new method of settlement there is no taxation of the United States securities, Philippine Islands, bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute and no discrimination against such assets though the State courts adhere to the application of the "proportionate" method of settlement whereby only a portion of non-taxable and exempt assets are deducted and wherein the entire value of non-taxable assets such as national bank shares and Federal Reserve Bank shares are deducted despite the fact that there is no distinction or difference in degree of exemption and non-taxability between these various assets. The petitioner contended that the discrimination between these assets is manifest and the violation of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States is clear.

The State courts hold that they have the power to amend the statute by allowing additional deductions and changing the method of settlement though such amendment of the

statute and change in the method of settlement are contrary to every decision of the State courts to and including the final decision of the State Supreme Court filed June 30, 1934, from which the first appeal was taken to the Supreme Court of the United States. The State courts hold that the tax is a tax upon shares *qua* shares and that there is constitutional authority to tax the shares of non-resident shareholders though it is manifest that the statute is a revenue statute and not a statute regulating the issuing of the shares of stock of a domestic corporation.

The petitioner contended that the "proportionate" method of settlement whereby a portion of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted under the express language of the statute was deducted imposes tax upon such securities, bonds and shares of stock, that such taxation is the necessary result of the application of such method of settlement, that the formula and calculation includes the value of such assets in the denominator of the fraction used to determine the portion of such assets to be deducted, the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted in the express language of the statute being included within the denominator of the fraction set forth in the judgment entered against the petitioner, to wit, $\frac{418{,}650}{2{,}158{,}045}$, it being self-evident that the larger the denominator of such fraction the less will be the amount of the deduction allowed and the less the amount of the deduction the larger the amount of tax imposed.

The petitioner contended that the discrimination against the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted by the express language of the statute is

likewise self-evident, for the method of settlement approved in the Girard Trust Company case (R. 182a) and in the instant case (R. 221a) requires that the full value of national bank shares and Federal Reserve Bank shares, both of which are shares of stock which are included within the shares of stock defined, described and exempted under the express language of the statute, be deducted in all cases and only a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the other members of the class of shares of stock defined and exempted under the express language of the statute is required to be deducted unless it can be established as a fact by the trust company-owner that such assets are wholly investments of the amount of capital stock paid in, surplus and undivided profits. The petitioner contended that it is self-evident that if the entire value of national bank shares and Federal Reserve Bank shares be deducted in order that they might not be included in the measure of the tax, a deduction of the entire value of all non-taxable and exempt assets is required in order that they be not taxed and be not discriminated against.

The petitioner contended that there is no authority in the State courts to make a tax settlement against it, for the reason that the Supreme Court of the United States, Federal questions having been raised, upon appeal held that the statute was void because discriminatory, that such decision of the Federal court was final and that there was no authority in the State courts to amend the statute by allowing additional deductions, that the allowance of such additional deductions was judicial legislation in violation of Section 1, Article IX, and Section 1, Article II, of the Constitution of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The petitioner contended that under the decision and mandate of the Supreme Court of the United States judgment should have been entered for the petitioner with costs.

The petitioner raised the Federal questions sought to be reviewed before the Department of Revenue, the Department of the Auditor General and the Board of Finance and Revenue of the State of Pennsylvania and in its appeal from the settlement of tax to the Court of Common Pleas of Dauphin County (R. 4a-18a), in the exceptions filed to the conclusions of law, rulings on requests for conclusions of law and the judgment directed to be entered by such court (R. 85a-103a), in its appeal to the Supreme Court of the State of Pennsylvania, Middle District, No. 19, May Term, 1934, and in its appeal to the Supreme Court of the United States, October Term, 1935, No. 3. (See Transcript of Record, Supreme Court of the United States, October Term, 1935, No. 3, statement of questions involved in the Supreme Court of Pennsylvania and assignments of error in the Supreme Court of Pennsylvania, pp. 72-90, (296 U. S. 113).) These questions were raised also before the Dauphin County Court to whom the mandate of the Supreme Court of the United States had been referred by the Supreme Court of Pennsylvania (see Record, *Commonwealth of Pennsylvania* v. *Schuylkill Trust Company*, Supreme Court of Pennsylvania, Middle District, No. 35, May Term, 1937, Demurrer filed by the petitioner, pp. 136a-143a; Exceptions of Defendant, petitioner, to the findings, conclusions of law and judgment directed to be entered by the Dauphin County Court, pp. 183a-208a; Additional Exceptions of Defendant, petitioner, pp. 217a-218a), and in its appeal to the Supreme Court of Pennsylvania, Middle District, No. 35, May Term, 1937 (see Brief of appellant, petitioner, filed in such appeal, Statement of Questions Involved, p. 1 and Assignments of Error filed in such appeal, pp. 7-43, incl.).

The petitioner believes and therefore avers that the said State statute of April 25, 1929, Pamphlet Laws 673, under authority of which the State Supreme Court entered its final judgment against the Schuylkill Trust Company is unconstitutional and void and has been held to be unconstitutional and void by the Supreme Court of the United States in this same case by its decision filed November 11, 1935 (296 U. S. 113), that the judgment entered by the said State Supreme Court violates the mandate of the Supreme Court of the United States issued in such case and that the construction and application of the said State statute embodied in the judgment entered against the petitioner by the State Supreme Court under the alleged authority of the said State statute constitute judicial legislation and are repugnant to the hereinbefore recited provisions of the Constitution of the State of Pennsylvania, the Constitution of the United States and the statutes of the United States, constitute a taxation of and a discrimination against obligations, securities and instrumentalities of the United States Government and violate Section 1 of Article IX and Section 1 of Article II of the Constitution of the State of Pennsylvania, Clause 2 of Section 8 of Article I of the Constitution of the United States which gives to the Congress of the United States the power to borrow money on the credit of the United States and constitute a deprivation of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and the decisions of the Supreme Court of the United States, in particular the decisions of such court in the cases of *Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* 296 U. S. 113 (1935); *Missouri* v. *Gehner,* 281 U. S. 313 (1930); *MacAllen Co.* v. *Mass.,* 279 U. S. 620 (1929); *Bank of California* v. *Richardson,* 248

S. 476 (1919), and *Corry* v. *Baltimore*, 196 U. S. 466 05).

E.

Cases Believed to Sustain Jurisdiction.

he following cases decided by the Supreme Court of United States are believed to sustain the jurisdiction:

Schuylkill Trust Company, Appellant, v. *The Commonwealth of Pennsylvania* (November 11, 1935), 296 U. S. 113;

Missouri v. *Gehner* (April 14, 1930), 281 U. S. 313;

MacAllen Co. v. *Mass.* (May 27, 1929), 279 U. S. 620;

Bank of California v. *Richardson* (January 27, 1919), 248 U. S. 476;

St. Louis, I. Mt. & So. Ry. Co. v. *Starbird* (April 30, 1917), 243 U. S. 592;

Corry v. *Baltimore* (February 20, 1905), 196 U. S. 466;

Carter v. *Texas* (April 16, 1900), 177 U. S. 442, 447.

Respectfully submitted,

JOHN ROBERT JONES,
Counsel for Appellant-Petitioner.

hiladelphia, Pennsylvania, August 16, 1937.

EXHIBIT "A".

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(213)

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT.

MAY TERM, 1937.

Nos. 35, 36.

COMMONWEALTH OF PENNSYLVANIA

v.

SCHUYLKILL TRUST COMPANY, *Appellant.*

COMMONWEALTH OF PENNSYLVANIA, *Appellant,*

v.

SCHUYLKILL TRUST COMPANY.

Appeals from Final Judgment of Court of Common Pleas of Dauphin County, in No. 61, Commonwealth Docket, 1933.

Opinion of the Court.

Filed Jun. 25, 1937.

STERN, J.

From a judgment of the Court of Common Pleas of Dauphin County fixing the settlement of the tax on shares of capital stock of defendant, a trust company, for the year 1930, both Commonwealth and defendant have appealed. The controversy was previously in this court (Commonwealth *v.* Schuylkill Trust Company, 315 Pa. 429) but on two of the questions involved an appeal was taken by defendant to the Supreme Court of the United States.[1] They

[1] The appeal was also as to the right of the Commonwealth to tax shares of stock of defendant owned by residents of States other than Pennsylvania, but the Supreme Court did not pass upon this question. It was decided—contrary to defendant's contention—in 315 Pa. 429.

were: (1) Whether a deduction from the appraisement on which the tax was assessed should be made for the value of shares of national bank stock held by defendant; (2) Whether a discrimination against United States government securities arose from the fact that their value was not deducted from the appraisement, although deductions were made for investments in "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares," as provided by the Acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673, which amended the original act of June 13, 1907, P. L. 640.[2]

As to the first question, the Supreme Court held (*Schuylkill Trust Company* v. *Pennsylvania*, 296 U. S. 113) that the national bank stock having been taxed to the bank's shareholders by the Act of July 15, 1897, P. L. 292, as amended by the Act of April 25, 1929, P. L. 677, it could not again be taxed to defendant's stockholders: R. S. § 5219, 12 U. S. C. A. § 548; *Bank of California* v. *Richardson*, 248 U. S. 476. On this point there can be no further controversy.

As to the second question, the Supreme Court stated that "The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government."[3] But because of the statutory deductions of the value of stocks already taxed or relieved from taxation by the state, no similar deduction being provided for in the case of United States securities, it "is impossible to avoid the conclusion" that the law

[2] There were further amendments to the Act of 1907 by the Acts of May 31, 1933, P. L. 1132, and July 28, 1936, Spec. Sess. P. L. 73, which finally eliminated all deductions from the amount of capital stock paid in, surplus and undistributed profits, in ascertaining the value of the shares for taxation.

[3] See *Van Allen* v. *The Assessors*, 3 Wall. 573; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 112; *Educational Films Corporation* v. *Ward*, 282 U. S. 379, 390.

works a discrimination against such securities. The court therefore remanded the cause "for further proceedings not inconsistent with this opinion." Mr. Justice CARDOZO filed a dissenting opinion, concurred in by Mr. Justice BRANDEIS and Mr. Justice STONE, in which he said that the Pennsylvania statutes were not passed as acts of " 'unfriendly discrimination' • • • against the national securities, nor • • • in aid of classes of investments with which the national securities are in substantial competition. • • • Assuming such a discrimination, I do not understand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it. • • • If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of lessened. The choice between these curative measures must be made by the state court."

The case being again before the Common Pleas of Dauphin County, that court rendered opinions, through President Judge HARGEST, (42 Dauphin Co. Rep. 317; 43 Dauphin Co. Rep. 258 and 261, and, in the companion case of *Commonwealth* v. *Girard Trust Company*, 42 Dauphin Co. Rep. 299), which are so comprehensive and self-vindicating that what here follows is more by way of restatement than of profitable addition. The court held that the effect of the United States Supreme Court decision was not wholly to invalidate the amendatory acts of 1923, 1927 and 1929, but merely to require, in the appraisal of the shares of stock of trust companies, that securities of the United States government be put upon the same favorable basis, by way of deduction from the tax valuation, as the investments eliminated under the specific provisions of those acts.

There are three possible solutions of the problem left open by the decision of the Supreme Court: one, urged by

the Commonwealth on its appeal; a second, urged by defendant on its appeal; the third, adopted by the court below.

1. The contention of the Commonwealth is that the Supreme Court held the amendatory acts of 1923, 1927 and 1929 unconstitutional, leaving the original act of 1907 unaffected,[4] and that the tax settlement of defendant's shares of stock should therefore be made in accordance with that act, which allowed no deductions whatever. It maintains that the proviso in the Act of 1907 which gave permission to a trust company paying the tax before the first of March to deduct investments in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, was merely the allowance of a discount for prompt payment, but that even if it were held to be unconstitutional as involving the same discrimination against United States securities as that brought about by the amendatory acts, its invalidity would not affect the remainder of the Act of 1907. Thus it is the Commonwealth's position that the discrimination should be remedied, not by allowing a deduction of the United States securities, but by eliminating the deductions granted by the amendatory acts.

2. Defendant agrees with the Commonwealth that the amendatory acts were completely nullified by the Supreme Court decision, but argues that the "discount" proviso of the Act of 1907 is also invalid, and that it cannot be amputated without destroying the act itself, severability being impossible because of the interdependence of the proviso and the body of the act.[5] Defendant further argues that the Act of 1907 is invalid even apart from the proviso, because it fails to exclude from the tax appraisement the value of the shares of stock of national banks, and therefore, on the Commonwealth's theory that such an exclusion cannot be "judicially" created, the Act of 1907 is incapable of constitutional application. The result would be that no statute would remain under which defendant's stock could be taxed.

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[4] *Eberle* v. *Michigan*, 232 U. S. 700, 705; *Truax* v. *Corrigan*, 257 U. S. U. S. 312, 342; *Davis* v. *Wallace*, 257 U. S. 478, 485.

[5] *Booth & Flinn, Ltd.*, v. *Miller*, 237 Pa. 297, 309; *Commonwealth* v. *Humphrey*, 288 Pa. 280, 290.

3. The court below approved of neither of these extreme positions, but adopted the intermediate course of holding that, since the Supreme Court had decided that the amendments to the Act of 1907, as interpreted by the state courts, imposed an unconstitutional tax upon securities of the United States government, the remedy was, not to declare these statutes invalid, but to limit their application by implying a legislative intent to exclude such securities. The court pointed out that this method of interpretative adaptation of a statute to constitutional requirements, far from being unique, has been regularly employed, and illustrations of its use are abundantly to be found in the decisions construing various other tax statutes.[6] For example, if an act imposes a tax upon various articles or subjects, and it cannot constitutionally be sustained as to one or more of them, the statute is not thereby invalidated as a whole, unless, of course, it clearly appears that the legislature would not have passed the act as thus reduced in scope. This is not "judicial legislation," nor does it involve a "rewriting" of statutory enactments; it adds nothing to the legislative provisions; it merely enforces them to the extent possible in view of constitutional limitations.[7] "A presumption of much importance in this country, . . . is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied

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[6] For example, in the case of the capital stock tax, *Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 146; *Commonwealth* v. *Lackawanna Iron & Coal Co.*, 129 Pa. 346, 356; *Commonwealth* v. *Westinghouse Electric & Manufacturing Co.*, 151 Pa. 265; *Commonwealth* v. *Westinghouse Air Brake Co.*, 251 Pa. 12. In the case of the corporate loans tax, *Pittsburgh, Fort Wayne & Chicago Railway Co.* v. *Commonwealth*, 66 Pa. 73; *Commonwealth* v. *Barrett Manufacturing Co.*, 246 Pa. 301. In the case of the tonnage tax, *In re State Freight Tax*, 15 Wall. 232, 282. In the case of the inheritance tax, *Bittinger's Estate*, 129 Pa. 338, 345; *Frick* v. *Pennsylvania*, 268 U. S. 473. In the case of the mercantile license tax, *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.

[7] In *Fidelity & Guaranty Fire Corporation* v. *Leser*, 190 Atl. 830, the Court of Appeals of Maryland held, in construing a statute of that State similar to the one here involved, that the deductions prescribed in the statute could not be allowed in view of the Supreme Court decision in the present case. In the Maryland act, however, there was a clause that "if any exemption or exception from any tax is held invalid, the tax shall apply without such exemption or exception."

by a contrary construction": Endlich, *Interpretation of Statutes*, § 178. "It is a safe and wholesome rule . . . to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply": *Idem*, § 179.

We are of opinion, therefore, that the decision of the court below constitutes the proper solution of the problem involved.

As to the method or formula employed to determine what part of the non-taxable investments are included within the capital stock structure, there is no serious complaint made by defendant, nor could there be in view of the previous decisions of this court. In *Commonwealth* v. *Hazelwood Savings and Trust Co.*, 271 Pa. 375, it was held that if a trust company purchases the non-taxable securities out of its paid-in capital stock, surplus and undivided profits, the entire value thereof should be deducted, but if out of its other assets, no part of their value is deductible, and that the burden is upon the company to prove that it did purchase the securities out of its capital stock account, and, if it fails to establish that fact, the Commonwealth may, perhaps, refuse to allow any deduction whatever; if, therefore, instead of doing this, the Commonwealth adopts the more equitable course of apportioning the value of the non-taxable securities between the two funds, the trust company has no just cause for complaint. The same method of apportionment was approved by this court when the present case was previously before it: *Commonwealth* v. *Schuylkill Trust Co.*, 315 Pa. 429, and again in *Commonwealth* v. *Provident Trust Co. of Philadelphia*, 319 Pa. 385.[8]

The judgment is affirmed.

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[8] The formula is as follows: The numerator consists of the capital paid in, surplus, and undivided profits, determined by the book values, less the book value of those investments, if any, for which a full deduction has been made. The denominator consists of the book values of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made. The multiplicand is the book value of the shares and securities which are to be apportioned. The result thus obtained is increased or diminished by the amount of appreciation or depreciation in the shares and securities apportioned.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 447

SCHUYLKILL TRUST COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

MOTION TO ADVANCE.

Now comes the appellant, by John Robert Jones, its counsel, who respectfully moves the Court to advance the above case on the docket of the Court and grant as early a hearing as possible therein for the following reasons:

1. That the matter at issue involves the imposition and collection of taxes by the Commonwealth of Pennsylvania imposed under and by the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673.

2. That in a suit between the same parties wherein the instant appellant was the appellant this Court held the said State statute to be discriminatory and void and reversed the judgment of the Supreme Court of the Commonwealth of Pennsylvania (*Schuylkill Trust Company, Appellant,* v. *The Commonwealth of Pennsylvania,* 296 U. S. 113).

3. That the instant appeal is an appeal from the final decision of the Supreme Court of the Commonwealth of Pennsylvania, which court, under the alleged authority of the mandate of this Court issued in the cited case, affirmed a judgment of the Dauphin County Court of Common Pleas imposing a tax under the authority of the said State statute of April 25, 1929, Pamphlet Laws 673.

4. That the decision of this Court in the cited case was filed November 11, 1935 (296 U. S. 113). That the Dauphin County Court, to which the mandate of this Court had been remitted by the Supreme Court of the State of Pennsylvania, upon April 20, 1936, entered a judgment against this appellant for tax in the amount of $1,457.03 under the alleged authority of the said mandate and State statute of April 25, 1929, Pamphlet Laws 673. That the appellant within the thirty-days' period from said April 20, 1936, the statutory period provided by the law of Pennsylvania, filed exceptions to the judgment of the said court. That the said Dauphin County Court disposed of the said exceptions and entered its final judgment against the appellant upon January 22, 1937 (42 Dauphin County Repts. 317; 43 Dauphin County Repts. 258, 260), in the amount of $1,441.39, whereupon this appellant took an appeal to the Supreme Court of the State of Pennsylvania, which latter court filed its decision affirming the judgment of the lower court June 25, 1937 (193 Atlantic Reporter 638).

5. That the said judgment of $1,441.39 entered by the Dauphin County Court upon January 22, 1937, which judg-

ment was affirmed by the State Supreme Court June 25, 1937, consisted of tax claimed to be owing to the Commonwealth of Pennsylvania in the amount of $1,385.42 upon which interest was calculated and added from April 8, 1933, to January 22, 1937, in the amount of $314.95, making a total of $1,700.37, upon which amount of tax and interest an Attorney General's commission was calculated at the rate of five per centum in the sum of $85.02, making a total amount claimed by the Commonwealth under authority of the said statute and the mandate of this Court in the amount of $1,785.39, from which latter sum the costs allowed to the appellant under the mandate of this Court in the amount of $344.00 were deducted, leaving a total balance claimed by the Commonwealth and for which judgment was entered against this appellant in the amount of $1,441.39.

6. That the delay and failure of the State courts to enter judgment for the appellant with costs and to make payment of costs to the appellant as directed by the mandate of this Court and the increasing and continued interest charges and costs of litigation work a hardship and impose a burden upon this appellant.

JOHN ROBERT JONES,
Counsel for the Appellant.

Served the above upon the Commonwealth of Pennsylvania, appellee, by mailing a copy thereof to Manuel Kraus, Esq., Deputy Attorney General, Department of Justice, State Capitol, Harrisburg, Pennsylvania, by first class mail September 25, 1937.

JOHN ROBERT JONES,
Counsel for the Appellant.

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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 447.

SCHUYLKILL TRUST COMPANY,
Appellant,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Brief of Appellant.

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I. Reference to the Official Reports of the Opinions Delivered by the Courts Below.

The opinions of the Court of Common Pleas of Dauphin County, delivered by President Judge Hargest are reported in 42 Dauphin County Reports 317, 297; 43 Dauphin County Reports 258, 260. (R. 100, 106; 152, 155).

The opinion of the Supreme Court of Pennsylvania delivered by Mr. Justice Stern is reported in 327 Pa. 127. (R. 187.)

II. The Grounds on which the Jurisdiction of this Court is Invoked.

Paragraph 1 of Rule 12 of this Court has been complied with.

A Statement as to Jurisdiction has been filed and printed.

III. Statement of the Case.

This is an appeal from the judgment of the Supreme Court of Pennsylvania affirming a judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

This court in an appeal between the same parties to No. 3, October Term, 1935, filed its opinion and entered its judgment reversing the judgment of the Supreme Court of Pennsylvania upon the ground that the statute in question in the instant appeal, the Act of April 25, 1929, Pamphlet Laws 673, was discriminatory and therefore unconstitutional, and remanded the cause for further proceedings not inconsistent with its opinion. (296 U. S. 113). The judgment of the Supreme Court of Pennsylvania from which the instant appeal is taken is said by the state court to be in compliance with the mandate of this court issued

in the cited appeal. A recital of the pertinent facts as they appear of record in both appeals is herein set forth.

The parties hereto were respectively the appellant and the appellee in an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania, making a settlement of tax against the appellant for the tax and calendar year ending December 31, 1930, fixing the liability of the appellant for a tax in the amount of $1,441.39 under the alleged authority of the Act of Assembly of the Commonwealth of Pennsylvania approved April 25, 1929, Pamphlet Laws 673, Laws of Pennsylvania, 1929 (R. 155).

The appellant is a domestic corporation to which letters patent were issued under the law of the State of Pennsylvania upon October 17, 1887. It filed its report for the twelve months ending December 31, 1930, in the Department of Revenue as required by the Act of Assembly of Pennsylvania of April 25, 1929, Pamphlet Laws 673. Thereupon the Department of Revenue made a settlement of tax against it under the alleged authority of the said Act of Assembly in the amount of $2306.08 upon January 25, 1932 which was approved by the Department of the Auditor General January 26, 1932 (R. 4).

Subsequent thereto and in due course a petition for resettlement was filed which was refused by the said Departments of Revenue and of the Auditor General. Thereupon a petition for review was filed with the Board of Finance and Revenue, which Board made a resettlement of the tax under the alleged authority of the said act upon January 26, 1933, whereby tax was imposed in the amount of $2290.14, from which resettlement the appellant took an appeal to the Court of Common Pleas of Dauphin County. (R. 5).

Hearing was had in the said Court of Common Pleas of Dauphin County upon the said appeal upon an agreed statement of facts and after argument, said court upon

October 19, 1933 affirmed the settlement of tax made by the Board of Finance and Revenue and directed the entry of judgment nisi in the amount of $1719.71 together with costs and Attorney General's Commission thereon in a total amount of $1863.17, which judgment was made absolute November 24, 1933. (R. 59, 73).

Thereupon and in due course the appellant took an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania, which court upon June 30, 1934 filed its opinion and directed the entry of judgment affirming the judgment of the court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Chief Justice Frazer (R. 73).

In due course an appeal was allowed to the Supreme Court of the United States, No. 3, October Term, 1935 (296 U. S. 113). (Opinion, R. 76).

The appeal was heard before this court and upon November 11, 1935 the opinion of the court was delivered and filed whereby the judgment of the state court was reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court. The judgment of the state court was reversed upon the ground that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the judgment of the state Supreme Court was entered, was discriminatory in violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States and the United States statutes recited in the Assignments of Error. (R. 76).

Upon February 11, 1936 the Commonwealth of Pennsylvania presented a petition to the Court of Common Pleas of Dauphin County praying the court to revise its original judgment entered November 24, 1933, which had been affirmed by the state Supreme Court June 30, 1934

and reversed by this court November 11, 1935, by entering judgment in favor of the Commonwealth and against the appellant in the amount of $2334.57 for tax imposed upon the full actual net asset value of the shares of stock of the appellant under authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640 and that such court issue a rule upon the appellant to show cause why such judgment should not be entered. February 11, 1936 the court issued a rule upon the appellant to show cause why the judgment prayed for should not be entered. (R. 94).

To such rule so made by the Dauphin County Court the appellant filed a demurrer praying the judgment of the court whether it should be required to make any answer to the petition and that it be hence dismissed with its reasonable costs in this behalf sustained. The causes of demurrer are fully set forth in the demurrer. The grounds thereof were, inter alia, that the Commonwealth was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement or to make a tax settlement under the Act of June 13, 1907, Pamphlet Laws 640, there being no such law in force in the State of Pennsylvania either at the time of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petition prayed that such settlement be made, and that the same constitutional defects which the Commonwealth admitted made void the Acts of April 25, 1929, Pamphlet Laws 673, May 7, 1927, Pamphlet Laws 853, and July 11, 1923, Pamphlet Laws 1071, made invalid and void the Act of June 13, 1907, Pamphlet Laws 640. (R. 95).

Oral argument was had upon the petition and demurrer. The Commonwealth contended that the Act of April 25, 1929, Pamphlet Laws 673 was unconstitutional and void and had been so held by the Supreme Court of the

United States and that the prior acts of May 7, 1927, supra, and July 11, 1923, supra, were likewise unconstitutional and void and that therefore a revision of the judgment should be made by the entry of judgment against the Schuylkill Trust Company under the first proviso of the Act of June 13, 1907, Pamphlet Laws 640, by denying all deductions. The appellant contended that judgment should be entered in its favor together with costs.

The Dauphin County Court overruled the demurrer filed by the appellant, without opportunity to file an answer to the petition, by such court's entering a judgment nisi upon April 20, 1936 imposing a tax together with interest and Attorney General's Commission in the amount of $1801.03 less costs expended in the Federal Court and allowed by said court in the amount of $344., the total judgment entered being $1,457.03. (R. 99). The judgment was based upon the same Act of April 25, 1929, Pamphlet Laws 673, after the court had amended it by allowing deductions in addition to those written in the statute by the legislature. (R. 100).

Thereafter in due course the appellant filed exceptions to the conclusions of law and judgment of the court, there being no dispute as to the facts which were set forth in the stipulations of facts filed at the time of the trial of the cause and before the entry of the original judgment dated November 24, 1933. (R. 127, 151).

January 18, 1937 the Dauphin County Court filed an opinion entitled "Opinion Upon Exceptions" wherein it states that it considered certain exceptions filed, that it had sustained some and overruled and modified others and thereupon proceeded to enter a new and differently formulated and calculated judgment in the amount of $1719.45, from which was deducted the hereinbefore referred to amount of costs in the sum of $344., the judgment entered being $1,375.45. The new formula and calculation were compounded of values, some stated to be "book value" and some "market value", a compound of figures and facts not

in evidence and not included in the Stipulation of Facts. The court in its opinion admits that its new and differing judgment is founded upon facts other than those upon which the tax settlement and the judgments of the state and federal courts were founded. (R. 152).

Subsequent thereto, finding that it had not ruled upon all of the exceptions, the court, upon January 22, 1937 filed another opinion entitled "Modified Judgment" wherein it is stated that the additional exceptions were overruled and proceeded to set forth the grounds of its final judgment which it entered upon such date, the judgment in this opinion being the sum of $1441.39 which was the amount of the tax, interest and Attorney General's commission, $1,785.39, less the hereinbefore referred to federal court costs of $344. The formula and calculation upon which this new judgment was based are a compound of facts not in evidence as was the basis of the earlier judgment directed to be entered January 18, 1937. (R. 155).

Thereupon and in due course the appellant took an appeal to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas of Dauphin County. Upon the filing of printed briefs oral argument was had in the Supreme Court of Pennsylvania which court upon June 25, 1937 filed its opinion and directed the entry of judgment affirming the judgment of the Court of Common Pleas of Dauphin County, the opinion of the Supreme Court being written by Mr. Justice Stern.

In due course and in accordance with the law of the State of Pennsylvania and the rules of the Supreme Court of Pennsylvania, the appellant filed its Petition For Reargument July 2, 1937 and upon July 12, 1937 was notified that reargument had been refused July 7, 1937.

Subsequent thereto and in due course the appellant presented its petition for the allowance of an appeal to this court which was allowed August 20, 1937 by the Hon. Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

The settlement of tax made by the Court of Common Pleas of Dauphin County under the alleged authority of the said state statute of April 25, 1929, Pamphlet Laws 673, and the mandate of the Supreme Court of the United States issued in the case of Schuylkill Trust Company, Appellant, vs. The Commonwealth of Pennsylvania, No. 3, October Term, 1935, 296 U. S. 113, which settlement of tax was embodied by the said court in a judgment entered against your petitioner January 22, 1937, which judgment was affirmed by the Supreme Court of Pennsylvania June 25, 1937, was made in accordance with the following method and calculation:

"Statement

"Capital stock and undivided profits (book value)		$440,667
Appreciation		25,247
Capital stock and undivided profits (market value)		$466,914
Less:		
(a) Full deduction for shares of National Bank	$20,202	
(b) Proportionate deduction for U. S. Securities and exempt shares of stock, $\frac{418,650}{2,158,045} \times 286,121 + 35 =$	55,541	75,743
Total value of capital stock		$391,171"

(Manifestly the term, "Total", should be Taxable.)

The tax was calculated upon the said amount of $391,171. at the rate of five mills with a resultant tax in the amount of $1955.85 upon which credit was given for a payment on account of $570.43, leaving a balance due the Commonwealth in the amount of $1385.42. (R. 154). Upon such amount of $1385.42 interest was calculated from April 8, 1933 to January 22, 1937 in the amount of $314.95 making a total of $1700.37. Attorney General's commission was

calculated upon the said sum of $1700.37 in the amount of $85.02, making a total of $1785.39. From this sum so claimed to be due in the amount of $1785.39 there was deducted:

> "Less Costs allowed appellant in the Mandate of the Supreme Court of the United States, 344.00",

leaving a balance of $1441.39, which was the amount of the final judgment directed to be entered by the Dauphin County Court January 22, 1937. (R. 155).

In order that the meaning, intent and effect of this method of calculation applied and embodied in the final judgment of January 22, 1937, and its relationship to the prior judgments entered by the same court in this same case embodying differing methods of settlement and calculations may be made clear, they will be set forth in the order of their sequence:

The method of settlement applied by the taxing officials and affirmed by the original judgment of the Dauphin County Court entered November 24, 1933 and affirmed by the Supreme Court of Pennsylvania June 30, 1934 is set forth in the Stipulation of Facts (R. 14). This method of settlement and the judgment consequent upon its application was considered by this court and held void, for the reason that this Court held the statute under authority of which it was applied discriminatory and void. By this method of settlement, formula and calculation the taxing officials of the Commonwealth of Pennsylvania determined the actual value of each and all of the assets of the appellant. They determined the actual value of the amount of capital stock paid in, the surplus and undivided profits of the appellant, which was the actual value of the net assets of the appellant and was the difference between the actual value of the total assets and the amount of the liabilities. The actual value of the total assets was fixed at $3,755,882. The actual value of the amount of the

capital stock paid in, the surplus and the undivided profits was fixed at $466,914. Included among the total assets were shares of stock issued by corporations which, under the express language of the statute, were exempted from the tax imposed. These shares of stock are described and classified in the statute as shares of stock issued by corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares. All of the shares of stock included within such class of shares exempted by the state statute were valued at $155,989., included within which class were Philadelphia National Bank shares of the value of $20,202. These shares are listed in Exhibit "2" which was made a part of Specification of Objection 7 in the appeal taken to the trial court and are listed also in the Stipulation of Facts filed with such court. (R. 12, 17).

The taxing officials then determined the value at which these exempt shares of stock of the actual value of $155,989. were taxed or relieved from tax or the capital stock of the corporations which issued them were taxed or relieved from tax under other taxing statutes of the state and fixed such value at $71,373., included within which were the said Philadelphia National Bank shares. (R. 18). They held that these shares of stock of the actual value of $155,989. were to be deducted from the amount of the capital stock paid in, the surplus and undivided profits at such portion of the said $71,373. as the amount of the capital stock paid in, the surplus and undivided profits bore to the value of the total assets and by such method fixed the amount of such deduction to be $8,886. The view of the taxing officials and the state courts was that the purpose of the exemption of such shares of stock under the language of the statute was to avoid double taxation (R. 56) and therefore since such shares of stock of the actual value of $155,989. had either been taxed or relieved from tax under other taxing statutes of the state or the corporations which issued them had been taxed or

relieved from tax upon their capital stock under other taxing statutes of the state, the appellant was not entitled to a deduction of the full value of these shares in the amount of $155,989. Thus did the state courts in their affirmation of the tax settlement and their construction and application of the state statute deny the claim of the appellant for the deduction of the whole actual value of the Philadelphia National Bank shares in the amount of $20,202. and the whole actual value of other tax-free shares in the total amount of $155,989.

The calculation in application of the theory of the taxing officials of the Commonwealth of Pennsylvania construing and applying the statute is set forth in the Stipulation of Facts (R. 15) and is as follows:

$$441{,}667. + 25{,}247. - \left(\frac{467{,}714.}{3{,}755{,}882.} \times 71{,}373.\right) = 458{,}028.$$

This calculation consists of the following elements: The sum, 441,667. + 25,247. or 466,914., was the actual value of the amount of the capital stock paid in, the surplus and undivided profits. From this sum of 466,914. was deducted the result of the calculation within the brackets, 8,886., with a resultant taxable value of 458,028. The numerator of the fraction 467,714., is the amount of capital stock paid in, the surplus and undivided profits. (There was a mistake in addition. The numerator 467,714., should have been 466,914. See Stipulation of Facts, R. 16; Statement of Counsel for the Commonwealth, R. 22.) The denominator of the fraction, $3,755,882., is the value of the total assets. The multiplicand, $71,373., is the taxed and exempt value of the tax-free shares of the actual value of $155,989., determined by the taxing officials as hereinbefore set forth. The portion of the said 71,373. subtracted as the result of the method of settlement and calculation was 8,886. and resulted in the sum

of 458,028. which was held to be the taxable value. The rate of tax, five mills, was thereupon applied to the said sum of $458,028. with a resultant tax settled against the appellant in the amount of $2,290.14.

There were included within the total assets of the appellant of the value of $3,755,882. national bank shares of the value of $20,202. which were included also within the class of exempt assets tax free under the statute of the whole actual value of $155,989. (R. 16, 17).

The only deductions allowed under the tax settlement made as the statute was construed and applied by the taxing officials and state courts were a deduction of the amount of the liabilities from the amount of the total assets which resulted in a fixing of the amount of the capital stock paid in, the surplus and undivided profits at $466,914. and a deduction from this latter sum of the said sum of $8,886., whereby a taxable value was determined in the amount of $458,028. The deduction of the full value of the said described shares of stock ($155,989.) was not allowed. The deduction allowed by reason of their ownership was $8,886., which is 5.6 per centum of their whole value. There was no deduction of the full value of national bank shares of the value of $20,202., which was included and listed in the said class of shares. (R. 14-19.) The only deduction allowed was such portion of the said $20,202. as the amount of capital stock paid in, the surplus and undivided profits bore to the total assets, to wit, a deduction of $2,515.,

$$\left(\frac{467{,}714}{3{,}755{,}882} \times 20{,}202. = 2515.\right),$$

which is 12.4 per centum of their whole actual value.

Among the total assets of the appellant of the value of $3,755,882. were United States securities of the value of $134,907., Philippine Islands bonds of the value of $10,900. and Joint Stock Land Bank bonds of the value of

$5,400. No deduction whatsoever was allowed by reason of the appellant's ownership of these assets.

The state courts in affirming the settlement made by the taxing officials held that the shares of stock to be deducted under the express language of the statute were to be deducted to the extent of such portion of their value which was taxed or exempted from tax under other state taxing statutes (in the instant case, $71,373.) as the amount of the capital stock paid in, the surplus and undivided profits bore to the total assets (in the instant case in the amount of $8,886.) for the reason, said the trial court, that under the statute "The sole purpose of this exemption clause was to avoid double taxation" (R. 56, 59). The state courts construed and applied the statute as directing the deduction of $8,886., 5.6 per centum of the whole actual value ($155,989.) of certain assets in order not to tax such portion twice, thereby construing and applying the statute as imposing a tax upon all assets not deducted, it being self-evident that if $8,886. of the value of assets were to be deducted in order to avoid double taxation, such assets as were not deducted were, in the opinion of the state courts, to be taxed once and that such was the intent and purpose of the statute. Hence it is that the state courts construed and applied the statute as imposing a tax upon the assets of the trust company less certain prescribed deductions and determined the amount of the tax liability by reason and on account of the kind of assets owned by the trust company and not upon the shareholders' interest in the shares of stock issued by the trust company.

In so holding the state courts ignored the fact that there was included within the said class of exempt shares of stock the national bank shares of the value of $20,202. and that the state was without authority to make such shares the basis for any other and further txation, the appellant being subject to tax upon such shares at their actual net asset value as the owner thereof under the

Pennsylvania Act of April 25, 1929, Pamphlet Laws 677. With reference to the United States securities, the Philippine Islands bonds and the Joint Stock Land Bank bonds, the state courts admitted that they were non-taxable assets, that the state was without authority to impose a tax upon them but held that they were not taxed, for the reason that, said they, the tax imposed by the said Act of April 25, 1929, Pamphlet Laws 673, was a tax upon shares qua shares, a tax upon the shareholders' interest in the shares issued by the appellant, and not a tax upon any of the assets owned by the appellant.

The appellant contended that the tax was not a tax upon shares as shares, that the statute expressly exempted certain assets owned by the trust company at their whole actual value and imposed the tax solely with reference to remaining assets and that therefore under the tax settlement there was not only a taxation of such non-taxable securities but also a discrimination against them, by reason of the exemption allowed to certain favored assets described in the statute. The appellant contended that the proper method of taxation in order to construe the state statute in conformity with the Acts of Congress and the Constitution of Pennsylvania and of the United States and thus carry out the intent of the state legislature was to determine the taxable value to which the rate of tax was to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares, and the full value of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, and that when such method is applied the amount of the tax is $570.43, which the appellant paid (See Defendant's Request for Conclusion of Law 18, R. 31). The appellant contended also that, in addition to the fact that the statute as written and construed and applied to it imposed a tax upon assets, such statute as construed and

applied to it discriminated against the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds because they were not deducted and eliminated from consideration at their full actual value, although there was a deduction made of a portion of the value of the tax-free shares of stock exempted under the express language of the statute and that consequently the immunity of such United States securities and such bonds and federal instrumentalities was infringed and that the national bank shares being subject to tax under the Pennsylvania statute of April 25, 1929, Pamphlet Laws 677, could not be made the basis of any other or further taxation and therefore must of necessity be deducted at their full value and eliminated entirely from consideration in determining any tax imposed under the Act of April 25, 1929 Pamphlet Laws 673, the statute under consideration in the instant case.

Though the state supreme court affirmed the judgment of the trial court and held, upon authority of its earlier decision in the case of Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921) construing and applying the Act of June 13, 1907, Pamphlet Laws 640, that the appellant was not entitled to a deduction of the whole value of the shares of stock ($155,989.) made tax-free under the express language of the Act of April 25, 1929, Pamphlet Laws 673, and thus denied, in its construction and application of the said Act of 1929, supra, the claim of the appellant for the deduction of the full value of the national bank shares ($20,202.) owned by it, the state supreme court said that the question as to the claim and right of the appellant for the deduction of the whole value of the national bank shares was not raised in the original Specification of Objections filed with the trial court, was not discussed by the trial court and therefore would not be considered by it. This statement and conclusion of the state supreme court was erroneous and was

so held by this court (296 U. S. 113). This court held that the question was properly raised in the state courts and in the federal court, that the national bank shares as well as the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds were discriminated against and subjected to tax, that they were included in the measure of the tax and that therefore the statute was discriminatory in violation of the United States statutes recited in the Assignments of Error and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The state supreme court in its opinion filed in support of its last judgment does not hold that this question was not properly raised by the appellant. The ruling of this court upon this point being set forth at length in the opinion filed, the contentions of the appellant with reference thereto are not repeated herein. (R. 187, 81.)

Having held that the tax imposed by the said Act of 1929 was a tax upon the shares of stock issued by the appellant qua shares and that it was a tax upon the shareholders' interest in such shares, the state courts held that such tax was imposed upon shares owned by non-residents and their interest as well as those owned by residents of the State. The appellant contended that if the tax was a tax upon shares qua shares and upon the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contended that the decision of the supreme court of the

United States in the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the appellant having been incorporated under the laws of Pennsylvania October 17, 1887 (R. 19), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the supreme court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The appellant contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case is an amendment, was construed by the supreme Court of Pennsylvania, in sustaining its constitutionality, as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied, (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of this court in the cited case of Corry v. Baltimore, supra, there was no authority in the state to impose a tax upon the shares owned by non-residents. The ruling of this court upon this point was that it was unnecessary to pass upon this contention of the appellant in view of the grounds of the decision that the statute in question was discriminatory and therefore void.

Subsequent to the issuing of the mandate of the supreme court of the United States the Dauphin County Court directed the entry of a judgment against the appellant in the amount of $1457.03 upon April 20, 1936, which it held was entered in compliance with such mandate. (R. 106.) The amount of such judgment, it was said, was determined in accordance with the method of settle-

ment set forth in the judgment itself which was an erroneous application of the principles set forth in its opinion.

The Dauphin County Court held that the statute was unconstitutional and void as it had been applied theretofore but that it had the power to allow additional deductions which the state supreme court had theretofore held the legislature did not intend to allow and had not allowed by this statute. The Dauphin County Court held also that by allowing such additional deductions in the manner in which it was allowing them in the instant case not only was the statute made constitutional but there was also a compliance with the mandate of the supreme court of the United States. (R. 100.)

The Dauphin County Court held that the statute was to be applied by the application of the following method of settlement:

(1) That the full market value, that is, the actual value of national bank shares and Federal Reserve Bank shares was to be deducted from the amount of capital stock paid in, surplus and undivided profits (the net assets) in all cases, irrespective of whether or not they were investments of the amount of capital stock paid in, surplus and undivided profits. (R. 103, 105.)

(2) That neither the shares of stock defined in the said statute and exempted from tax by the language of such statute nor the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and other obligations of the United States government and its agencies and instrumentalities were to be deducted from the amount of capital stock paid in, surplus and undivided profits at their full actual value unless the trust company-owner of such assets established as a fact that they were wholly investments of the amount of capital stock paid in, surplus and undivided profits, that if it were not

shown that they were wholly such investments, then in the case of such assets, the court said, "a proportionate deduction is to be made". (R. 102, 105.)

(3) That the proportionate deduction was to be made according to the following formula (R. 104):

> "(a) The numerator to consist of the capital, surplus and undivided profits, determined by the book value of the assets, less the book value of those securities for which a full deduction has been made; (b) the denominator to consist of the book value of the permanent investments, less the book value of those securities, for which a full deduction has been made; (c) such fraction to be multiplied by the book value of the securities which are to be apportioned; (d) the result thus obtained to be increased or decreased by the amount of appreciation or depreciation in the value of the securities which are apportioned."

(4) That in the case of the appellant, since it owned Philadelphia National Bank shares of the value of $20,202., the full value thereof was to be deducted, though it had not been shown that the national bank shares were wholly investments of capital stock paid in, surplus and undivided profits, and that, since the appellant had not shown that United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of an actual value of $151,207. and the shares of stock defined and exempted by the language of the statute exclusive of the said national bank shares of an actual value of $135,787. were purchased, were wholly investments of the amount of capital stock paid in, surplus and undivided profits, a proportionate deduction was to be made in the manner outlined.

At this point the Dauphin County Court was confronted with the fact that this method of settlement could

not be applied to the appellant because there was nothing in the record to show book values of assets, what was meant by book values, what was meant by permanent investments and what the permanent investments owned by the appellant were and their book value was. Nevertheless the Dauphin County Court proceeded as the statement of the calculation of its judgment shows in the record (R. 105). It applied the actual values of each and all assets though its formula outlined in its opinion was to the contrary. The judgment calculated was not determined in conformity with the method of settlement which the court approved and which it held complied with the mandate of the supreme court of the United States. It fixed the actual value of the amount of capital stock, surplus and undivided profits at $466,914.; it deducted the actual value of the national bank shares in the amount of $20,202.; it allowed a deduction of a portion of the actual value of the United States securities and a portion of the actual value of the remaining exempt shares of stock of a total value of $286,994. in the amount of $34,318. (R. 105.) It arrived at such sum of $34,318. by application of the following fraction:

$$\frac{446{,}712.}{3{,}735{,}680.} \times 286{,}944.$$

The numerator of the fraction, $446,712., is the actual value of the amount of capital stock paid in, surplus and undivided profits, $466,914., minus the value of the national bank shares, $20,202.

The denominator of the fraction, $3,735,680., is the actual value of all the assets as shown in the stipulation of facts (R. 15), $3,755,882., less the actual value of the national bank shares, $20,202.

The multiplicand of the fraction, $286,944., (should be $286,994., see R. 153), is the actual value of the United

States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, $151,207., plus the actual value of the shares of stock defined in the statute, $155,989., exclusive of the actual value of the national bank shares (R. 17) which had been deducted at their actual value of $20,202.

As the result of the foregoing there was deducted from the actual value of the amount of the capital stock paid in, surplus and undivided profits, $466,914., the full actual value of the national bank shares, $20,202., and the sum of $34,318. which was a portion of the actual value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the exempt shares of stock defined and exempted by the language of the statute exclusive of the actual value of the national bank shares of a total value of $286,994., the total deduction being $54,520. making the taxable value of the capital stock $412,394., with a resultant tax in the amount of $2,061.97. (See R. 105.)

Thereafter the court, seeing that it had determined a judgment by a method of calculation which did not apply the method of settlement which it had held in its opinion was a constitutional interpretation, construction and application of the statute and a compliance with the mandate of the supreme court of the United States and finding that there was no evidence of record as to book value of assets of the appellant, no evidence as to what constituted permanent investments, what the permanent investments were which were owned by the appellant and what the book values of permanent investments were (see Stipulation of Facts and Supplemental Stipulation of Facts, R. 14, 18), proceeded to change the valuations set forth in the method of calculation whereby it had in its prior judgment of April 20, 1936, determined the amount of the proportionate deduction for the exempt shares of stock defined in the language of the statute

and the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds. (See opinion, R. 152, 155.) The court changed the numerator of the fraction from $446,712. to $418,650., which latter sum it says in its opinion "is obtained by adding capital, $132,625, surplus $230, undivided profits $79,042., total $441,667, which are the book values less the book values of National Bank Shares, $23,017., making $418,650." (R. 153.) The court changed the denominator of the fraction from $3,735,680. to $2,158,045., which it says in its opinion (R. 153) is "the book value of permanent investments less the book value of those shares, if any, for which a full deduction has been made." The court said "that the permanent investments amount to $2,181,062., and after deducting the book value of the National Bank shares, $23,017, we get the denominator, $2,158,045." The court changed the multiplicand, $286,944. ($286,994.) to $286,121. The court said (R. 153), "Instead of the multiplicand used by us, $286,994., the correct multiplicand is $286,121. This error is accounted for by the fact that the tax value of the Pennsylvania Power & Light Company shares was taken instead of the book value, which is $800 less and the total book value of the exempt items amounts to $286,121.38. There was a mistake of $73.00 in that calculation. So that correctly adding the book value of the shares which are apportioned, the amount is $286,121 instead of the figure $286,994." (R. 153.)

After having made such alterations in the figures applying its formula the court proceeded to add the sum of $35., which latter sum it says is the "appreciation which should be added to the result of the fraction . . ." As a result of the foregoing the proportionate deduction calculation becomes (R. 154):

$$\frac{418{,}650}{2{,}158{,}045} \times 286{,}121 + 35 = 55{,}541.$$

The first fact to be noted is that there is no evidence whatsoever upon which to base any of the figures embodied within this new proportionate method of calculation. There were no such facts or factors as book values of assets of the appellant, what constituted permanent investments, what the permanent investments of the appellant were, if any there were, what their book or actual value was, considered by the taxing officers who made the tax settlement against the appellant. This is demonstrated by the record itself and is admitted by the Dauphin County Court and the state supreme court in the opinions filed in the case of Commonwealth v. Provident Trust Company of Philadelphia, 40 Dauphin Co. Repts., 146 (1935), 41 Dauphin Co. Repts., 1, (1935), 319 Pa. 385, (1935), in which sase it was said that in the year 1930, the year here in question, all settlements and methods of settlement and calculations were based upon actual values. (40 Dauphin, supra, 169.) There were no such facts or factors before the Dauphin County Court in the trial of this case and the entry of its original judgment, before the supreme court of the state of Pennsylvania when it entered its final judgment June 30, 1934, or before this court. Not only was there no such evidence but there was no hearing nor an opportunity for a hearing given the appellant upon such matter. The truth of these statements is established by the opinions of the court itself which appear of record (R. 100, 152).

As shown, the application of the new calculation fixes a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and a portion of the value of the shares of stock exempted under the statute, exclusive of the national bank shares, of the total value of $286,994. at $55,541. Accordingly the Dauphin County Court upon January 18, 1937, applied its new calculation (R. 152, 154) and as a result thereof there was deduction from the actual value of the amount of the capital stock paid in, surplus and

undivided profits, $466,914., the actual value of the national bank shares, $20,202., the recited proportionate deduction of $55,541. or a total deduction of $75,743., thereby fixing the taxable value at $391,171. with a resultant tax in the amount of $1955.85.

Thereafter, finding that it had not ruled upon all of the exceptions filed by the appellant, the court entered its final judgment upon January 22, 1937, in the amount of $1441.39. (R. 155.) This final judgment differs from the judgment of $1375.45 entered January 18, 1937, solely in the amount of the interest calculation and Attorney General's Commission. All three of the judgments entered, the judgment of April 20, 1936, the judgment of January 18, 1937, and the final judgment of January 22, 1937, allow as a deduction the costs which the mandate of this court stated were to be paid to the appellant in the amount of $344. These costs, as the final judgment shows, are allowed as a deduction from a sum which includes interest calculated to January 22, 1937, as a result of which not only was a judgment entered against the appellant for taxes but the appellant was charged interest upon costs which were owing to it from the date of the decision of the supreme court of the United States, November 11, 1935, to January 22, 1937.

The supreme court of the state of Pennsylvania affirmed the final judgment which the lower court entered January 22, 1937, in favor of the Commonwealth and against the appellant in the amount of $1441.39 and filed its opinion June 25, 1937. Its opinion is nothing more than an approval of everything done by the Dauphin County Court. (R. 187.)

The Dauphin County Court and the state supreme court held that the tax imposed by the said statute was a tax upon the shares issued by the appellant qua shares, that it was a tax upon the shareholders' interest in the shares, that it was imposed upon the shares owned by

non-residents and their interest in such shares as well as those owned by the residents of the state. The appellant contended that if the tax was a tax upon shares qua shares and upon the shareholders' interest in the shares, the state of Pennsylvania was without authority to impose such tax upon the non-resident shareholders for the reason that the situs of the shares for taxation purposes was the domicile of their owners and therefore such property was beyond its taxing jurisdiction when owned by non-residents and the imposition of such tax violated the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contended that the decision of the supreme court of the United States in the case of Corry v. Baltimore, 196 U. S. 466 (1905) did not support the conclusion of the state courts, the appellant having been incorporated under the laws of Pennsylvania October 17, 1887 (R. 19), upwards of twenty years before the passage of the Act of June 13, 1907, Pamphlet Laws 640, and that at the time of its creation there was no law of Pennsylvania which made this state the situs for the taxation of shares of stock owned by non-residents, the law of the state as declared by the supreme court being to the contrary. (Commonwealth v. Standard Oil Co., 101 Pa. 119, 133 (1882).) The appellant contended that the said Act of 1907, of which the Act of April 25, 1929, Pamphlet Laws 673, under consideration in the instant case, is an amendment, was construed by the supreme court of Pennsylvania, in sustaining its constitutionality, as a revenue statute, as not providing a new system of taxation nor introducing new taxable subjects but as simply changing the method of determining the measure of value to which the rate of tax was to be applied, (Commonwealth v. Mortgage Trust Company, 227 Pa. 163, 183 (1910)), and therefore under the authority of the decision of the supreme court of the United States in the cited case of Corry v. Baltimore, supra, there was no authority in the

state to impose a tax upon the shares owned by non-residents.

The appellant also contended that this court in its decision filed November 11, 1935, had held that none of the shares of stock issued by the appellant was taxable for the reason that the state statute of 1929 was discriminatory and therefore unconstitutional and void and that it had so declared in its opinion. (R. 76.)

The sole difference between the original judgment entered by the Dauphin County Court November 24, 1933, affirmed by the opinion and judgment of the state supreme court June 30, 1934, from which judgment the appeal was taken to the supreme court of the United States, and this latest judgment of the state supreme court which is said to be a compliance with the mandate of the supreme court of the United States is an increase in the amount of the deductions allowed by reason of the appellant's ownership of national bank shares, United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, the deduction allowed being a deduction of the full value of the national bank shares and a deduction of a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute, such portion being 19 per centum of their entire value.

The state courts now hold that the statute as it is now construed and applied in the tax settlement embodied in the judgment entered against the appellant is constitutional and complies with the mandate of the supreme court of the United States. The state courts adhere to the conclusion that under the new method of settlement there is no taxation of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined, described and exempted under the express language of the statute and no discrimination against such assets though the state courts adhere to the

application of the "proportionate" method of settlement whereby only a portion of non-taxable and exempt assets are deducted and wherein the entire value of non-taxable assets such as national bank shares and Federal Reserve Bank shares are deducted despite the fact that there is no distinction or difference in degree of exemption and non-taxability between these various assets. The appellant contended that the discrimination between these assets is manifest and the violation of the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States is clear.

The state courts hold that they have the power to amend the statute by allowing additional deductions and changing the method of settlement though such amendment of the statute and change in the method of settlement are contrary to every decision of the state courts to and including the final decision of the state supreme court filed June 30, 1934, from which the first appeal was taken to this court. The state courts hold that the tax is a tax upon shares qua shares and that there is constitutional authority to tax the shares of non-resident shareholders though it is manifest that the statute is a revenue statute and not a statute regulating the issuing of the shares of stock of a domestic corporation.

The appellant contended that the "proportionate" method of settlement whereby a portion of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted under the express language of the statute was deducted imposes tax upon such securities, bonds and shares of stock, that such taxation is the necessary result of the application of such method of settlement, that the formula and calculation includes the value of such assets in the denominator of the fraction used to determine the portion of such assets to be deducted, the value of the

United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted in the express language of the statute being included within the denominator of the fraction set forth in the judgment entered against the appellant, to wit,

$$\frac{418,650.}{2,158,045.}$$

, it being self-evident that the larger the denominator of such fraction the less will be the amount of the deduction allowed and the less the amount of the deduction the larger the amount of tax imposed.

The appellant contended that the discrimination against the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the shares of stock defined and exempted by the express language of the statute is likewise self-evident, for the method of settlement approved in the Girard Trust Company case (R. 106-126), and in the instant case (R. 154) requires that the full value of national bank shares and Federal Reserve Bank shares, both of which are shares of stock which are included within the shares of stock defined, described and exempted under the express language of the statute, be deducted in all cases and only a portion of the value of the United States securities, Philippine Islands bonds, Joint Stock Land Bank bonds and the other members of the class of shares of stock defined and exempted under the express language of the statute is required to be deducted unless it can be established as a fact by the trust company-owner that such assets are wholly investments of the amount of capital stock paid in, surplus and undivided profits. The appellant contended that it is self-evident that if the entire value of national bank shares and Federal Reserve Bank shares be deducted in order that they might not be included in the measure of the tax, a deduction of the entire value of

all non-taxable and exempt assets is required in order that they be not taxed and be not discriminated against.

The appellant contended that there is no authority in the state courts to make a tax settlement against it, for the reason that the supreme court of the United States, federal questions having been raised, upon appeal held that the statute was void because discriminatory, that such decision of the federal court was final and that there was no authority in the state courts to amend the statute by allowing additional deductions, that the allowance of such additional deductions was judicial legislation in violation of Section 1, Article IX, and Section 1, Article II, of the Constitution of Pennsylvania and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

The appellant contended that under the decision and mandate of the supreme court of the United States judgment should have been entered for the appellant with costs.

IV. Specification of Errors.

1. The Supreme Court of Pennsylvania erred in that its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County is not a compliance with the mandate of the Supreme Court of the United States. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

2. The Supreme Court of Pennsylvania erred in not directing judgment to be entered in favor of the Schuylkill Trust Company, Appellant, and against the Commonwealth of Pennsylvania, together with costs. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

3. The Supreme Court of Pennsylvania erred in that its final judgment affirming the final judgment of the Court of Common Pleas of Dauphin County construing

and applying the Act of April 25, 1929, Pamphlet Laws 673 constitutes judicial legislation, the Supreme Court of the United States upon appeal, federal questions having been raised, having held the said Act of April 25, 1929, Pamphlet Laws 673 discriminatory, unconstitutional and void. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

4. The Supreme Court of Pennsylvania erred in that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which it entered its final judgment, is discriminatory, unconstitutional and void in violation of the federal statutes and the state and federal constitutional provisions recited in the Assignments of Error. (Assignments of Error Nos. 1 to 16, inclusive.) (R. 228-239.)

5. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673, as construed and applied by it after such court had written into the statute, subsequent to the decision of the Supreme Court of the United States, words allowing deductions in addition to those written into it by the legislature was constitutional and did not impose a tax upon United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

6. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673 as construed and applied by it after such court had written into the statute, subsequent to the decision of the Supreme Court of the United States, words allowing deductions in addition to those written into it by the legislature was constitutional and did not discriminate against

United States securities, Philippine Islands bonds and Joint Stock Lank Bank bonds in violation of Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

7. The Supreme Court of Pennsylvania erred in holding that the Act of April 25, 1929, Pamphlet Laws 673 as construed and applied by it in the tax settlement made against the appellant by a method of settlement wherein and whereby the tax liability is determined by the kind of assets owned by each trust company without regard to the value of the shares issued by it and the value of the shareholders' interest in the shares, as a result of which the amount of tax is increased by reason of the appellant's ownership of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds was constitutional and did not violate Clause 2 of Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the federal statutes cited in Assignments of Error Nos. 1 to 16, inclusive. (R. 228-239.)

8. The Supreme Court of Pennsylvania erred in that it construed and applied the Act of April 25, 1929, Pamphlet Laws 673, in the tax settlement made against the appellant as imposing a tax upon shares qua shares, upon the shareholders' interest in the shares, owned both by residents and non-residents of the State of Pennsylvania, and that the statute so construed and applied was constitutional and did not violate Section 1 of the Fourteenth Amendment to the Constitution of United States. (Assignments of Error Nos. 1 to 16 inclusive.) (R. 228-239.)

9. The Supreme Court of Pennsylvania erred in that it construed and applied the Act of April 25, 1929, Pamphlet Laws 673, in the tax settlement made against the appellant as imposing a tax upon the shares of stock issued by the appellant qua shares owned by non-residents of the State and that the statute so construed and applied was constitutional and did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Error Nos. 3, 10, 13.) (R. 229, 235, 238.)

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1. General Statement.

By the judgment of the state Supreme Court entered June 30, 1934, which judgment was reversed by this court

November 11, 1935, a deduction of $8,886. was allowed from the value of the net assets of the trust company to determine the taxable value of the shares in the amount of $458,028. (R. 16, 79.)

This deduction of $8,886. was 5.6 per centum of the value of the shares of stock defined in the said statute of April 25, 1929, Pamphlet Laws 673 as "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares" owned by the appellant of the total value of $155,989., no deduction being allowed for the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds owned by the appellant of the total value of $151,207. (R. 17, 74, 81.)

By the judgment of the state Supreme Court entered June 25, 1937, from which judgment the instant appeal was allowed, a deduction of $75,743. was allowed from the value of the net assets of the appellant to determine the taxable value of the shares in the amount of $391,171. (R. 154.)

This deduction of $75,743. consisted of the value of naitonal bank shares in the amount of $20,202. and the sum of $55,541., which sum of $55,541. is 19 per centum of the value of the shares of stock defined in the said statute of April 25, 1929, Pamphlet Laws 673 as "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares", (exclusive of the said value of the national bank shares), owned by the appellant of the total value of $135,787. and 19 per centum of the value of United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of the total value of $151,207. (R. 154.)

The record establishes the fact that the sole difference between the judgment entered June 30, 1934, and the judgment entered June 25, 1937, which it is said is a com-

pliance with the mandate of this court, is one of fact and that fact is that under the judgment entered June 30, 1934, there was no deduction allowed by reason of the appellant's ownership of the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and a deduction was allowed of a portion of the value of the national bank shares and under the said judgment entered June 25, 1937, there was a deduction allowed in the amount of 19 per centum of the value of the said United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds and a deduction of the full value of the said national bank shares. (R. 154.)

The method of settlement which was applied to determine the amount of the judgment entered June 25, 1937, is, as was the method of settlement applied in determining the amount of the judgment entered June 30, 1934, the "proportionate" method. The purpose and the effect of the application of the "proportionate" method of settlement is to eliminate but a portion of the assets to which it is applied. Such is its effect under both judgments entered by the state Supreme Court. (R. 73, 187.)

Under both judgments entered by the state Supreme Court tax is imposed, as the opinions declare, upon shares of stock owned by non-residents of the state. (R. 75, 187.)

The appellant contends (1) that the Act of April 25, 1929, Pamphlet Laws 673, under authority of which the judgment was entered by the state Supreme Court, is unconstitutional and void, that it was so held by this court by its decision filed November 11, 1935, in an appeal between the same parties to No. 3, October Term, 1935, (296 U. S. 113); (2) that a compliance with the mandate of this court required that the state Supreme Court direct the entry of judgment for the appellant with costs; (3) that the state Supreme Court and the Dauphin County Court, the judgment of which was affirmed by the state

Supreme Court, were without constitutional authority to amend the said statute by writing into it words allowing deductions in addition to those written into it by the legislature and that such amendment of the statute is judicial legislation forbidden by both state and federal constitutions; (4) that the said Act of April 25, 1929, Pamphlet Laws 673, as amended by the state courts is unconstitutional and the judgment entered under its authority is void for the reason (a) that the said statute as amended by the state courts imposes a tax upon United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds; (b) that the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds are discriminated against; (c) that the operation and effect of the statute as amended and applied to the appellant by the judgment entered against it by the state Supreme Court is to impose a tax upon assets of trust companies, not upon shares of stock issued by them qua shares in the hands of their owners; (d) that if the tax be a valid tax imposed upon the shares issued by the appellant qua shares there is no constitutional authority in the state to impose such tax upon non-resident shareholders ; (e) that as a consequence of the construction and application of this statute as it has been amended by the state courts it violates the constitutional provisions and federal statutes specified in the Assignments of Error; (f) that there is no authority in the state courts to use book values of assets instead of actual values and that there is no evidence of record of the book values which were used in the method of settlement applied to determine the amount of the judgment entered against the appellant, and (g) that these questions were raised before and ruled upon by the state trial court and state Supreme Court.

The state Supreme Court, as its opinion discloses, based its judgment upon the opinion of the Dauphin County Court and made the reasoning of the latter court

its own. The state courts, as their opinions disclose, admit the unconstitutionality of the said statute but hold that they had authority to amend the statute by allowing additional deductions and that by allowing such additional deductions in the manner and by the method of settlement which such courts applied to the appellant they had made the statute constitutional and complied with the mandate of the Supreme Court of the United States, that the tax imposed by the statute as thus amended by the state courts was upon shares qua shares and that the state had constitutional authority to impose such tax upon the shares of stock owned by non-residents of the state.

2. The judgment of the Supreme Court of Pennsylvania does not comply with the mandate of the Supreme Court of the United States.

The judgment of the Supreme Court of Pennsylvania does not comply with the mandate of the Supreme Court of the United States for the reason that this court held, as its opinion discloses, that the state statute of April 25, 1929, Pamphlet Laws 673, under authority of which the tax settlement was made and the judgment entered, was discriminatory, that the burden of the tax was increased by reason of the ownership of United States securities, that the statute discriminated against United States securities solely by reason of ownership of such securities and for such reason was the judgment reversed. It was for such reason, this court said, that it was not necessary to consider the contention of the appellant that if the tax were a tax upon shares qua shares the state was without constitutional authority to impose a tax upon the shares of stock owned by non-residents.

The conclusion that the state statute is unconstitutional and void was admitted in the petition filed by the Commonwealth upon which the rule to show cause was issued by the Dauphin County Court upon February 11,

1936, after the mandate of this court had issued, the rule to show cause why judgment should not be entered by the court's making a tax settlement against the appellant under the authority of the first proviso of the Act of June 13, 1907, Pamphlet Laws 640. (R. 94.)

This conclusion is admitted also by the Dauphin County Court in its opinion filed in support of its judgment entered April 20, 1936, the court, despite the decision of the state Supreme Court filed June 30, 1934, and the final and conclusive decision of this court filed November 11, 1935, holding that it had the power to change the meaning of the statute and the intention of the legislature and thereby the application of the statute made by the taxing officials, its original judgment and the recited judgments of the state Supreme Court and of this court. (R. 100.)

Such conclusion of the Dauphin County Court was affirmed by the state Supreme Court.

The Commonwealth and both state courts were in agreement upon the conclusion that the statute as it was enacted by the state legislature was unconstitutional and void.

It is respectfully submitted, therefore, that the judgment of the state Supreme Court is not a compliance with the mandate of this court, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

3. The judgment of the Supreme Court of Pennsylvania constitutes judicial legislation.

As hereinbefore stated, after the decision of this court and the receipt of its mandate to the state Supreme Court, the Commonwealth presented a petition to the Dauphin County Court praying for the entry of judgment in favor of the Commonwealth and against the appellant by the

court's making a settlement of tax against the appellant for the tax and calendar year in question under authority of the first proviso of the Act of June 13, 1907, P. L. 640. (R. 94.)

The petition was predicated upon the conclusion that the Act of April 25, 1929, P. L. 673, is unconstitutional and void and that the appellant was under no liability for the payment of tax based upon a settlement made under authority of such statute.

Upon this petition the court entered a rule upon the appellant to show cause why such judgment should not be entered. To this rule the appellant filed a demurrer reserving the right to answer. (R. 95.) The causes of demurrer were fully set forth therein, the grounds thereof being, inter alia, that the petitioner was not entitled to the relief prayed for, that there was no authority in the Court of Common Pleas of Dauphin County to make a tax settlement, no authority to make a tax settlement under the Act of June 13, 1907, P. L. 640, there being no such statute in force in the state either at the time of the filing of the petition or during the tax and calendar year for which the tax settlement was originally made and for which the petitioner prayed that the settlement be made by the court, that the same constitutional defects which the Commonwealth admitted made the acts of April 25, 1929, P. L. 673, May 7, 1927, P. L. 853 and July 11, 1923, P. L. 1071, invalid and void made invalid and void the Act of June 13, 1907, P. L. 640, that the court was without any statutory or constitutional power to revise its judgment entered under the alleged authority of the Act of April 25, 1929, P. L. 673 by striking off such judgment and substituting in lieu of it a judgment for the tax claimed to have been imposed under authority of another act of assembly under the authority of which no tax was imposed in the said year against any trust company in the state, that, if the 1907 statute were applicable, the substantial provision of such statute (referred to in this Brief as the

second proviso) imposed the tax and by its terms, whicl are the precise terms of the 1923 statute and are embodiec in the express terms of the 1927 and 1929 statutes, the judgment is similarly discriminatory as that which was entered under authority of the unconstitutional 1929 statute, that the entry of the judgment prayed for imposed a tax upon both resident and non-resident shareholders of the appellant with consequent violation of federa statutes and the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Con stitution of the United States.

Argument was had upon this petition and demurrer Thereafter the Dauphin County Court upon April 20, 1936 (R. 99; 42 Dauphin Co. Repts. 317), without allowing the filing of an answer, directed the entry of a judgment under the alleged authority of the same Act of April 25 1929, P. L. 673, against the appellant in the amount of $1,457.03, filing its opinion April 24, 1936. To this nisi judgment the appellant filed exceptions. The lower court upon January 18, 1937, filed an "Opinion Upon Excep tions" (R. 152; 43 Dauphin Co. Repts. 258) wherein it sus tained and modified some of the exceptions and overruled others and directed the entry of judgment in the sum of $1, 375.45 upon alleged facts not of record. Thereafter, finding that it had not ruled upon all of the exceptions, the court filed another opinion entitled "Modified Judgment", over ruled the remaining exceptions and upon January 22, 1937 entered its final judgment directing the entry of judgmen against the appellant in the amount of $1,441.39 (R. 155; 4 Dauphin Co. Repts. 260). The Dauphin County Court re fused to make a tax settlement under the Act of June 1 1907, P. L. 640, as the Commonwealth petitioned, upon th ground that such statute was unconstitutional (R. 121).

The Dauphin County Court stated that the Acts o April 25, 1929, P. L. 673, May 7, 1927, P. L. 853 and Jul 11, 1923, P. L. 1071 were "unconstitutional as 'construe

and applied by the Department and the courts' in the settlement in this case" and thereupon proceeded to declare a different intention of the legislature with a consequent different construction of the said Act of April 25, 1929. The court announced the intention of the legislature in its enactment to have been different from that which it had held to be the intention in its first judgment which the state Supreme Court affirmed in its decision filed June 30, 1934.

The thought of the Dauphin County Court is that, though the court of last resort of the state construed the act of 1929 by declaring and applying the intent of the legislature in its enactment to the facts and though such statute was held by this court to be in violation of federal statutes and of the federal constitution, nevertheless, it, the court of first instance, can thereafter declare the meaning and intent of the legislature to have been diametrically opposite to that which had been held and applied theretofore, and thereupon apply such new intention of the legislature by making a new tax settlement and embody such settlement in a judgment against the appellant; and furthermore that it can predicate such settlement and judgment upon an alleged different state of facts not in evidence and by a method of tax settlement differing from that applied to all other trust companies in the same tax year though the language of the statute was the same upon April 20, 1936, January 18, 1937 and January 22, 1937, the date of its new judgment, as it was upon November 24, 1933, the date upon which it entered its original final judgment.

The Dauphin County Court recognized that this court held the statute discriminatory and therefore unconstitutional and void. Upon this fact is its decision based. The court, however, proceeded upon the theory that by the exercise of judicial power vested in it as a court it can, in the case of a statute which violates federal statutes and the federal constitution and has been so held by the

United States Supreme Court, make the statute constitutional by the declaration of an intent on the part of the legislature in the enactment of the statute different from the intent which had been judicially declared by *the state and United States supreme courts,* embodied in a judgment affirmed by the state Supreme Court and upon review reversed by the United Ctates Supreme Court and *can effectuate such different intent by adding words of limitation to the statute.* That such an exercise of power by a court is itself unconstitutional and therefore void cannot admit of doubt, for such action of the court is that of a law-making body; the power exercised by the Dauphin County Court by its judgment is a legislative power (State Constitution (Art. II.).) *Its new judgment amends the Act of 1929.* One might stop here without more, for a reading of the opinion and judgment of the county court entered October 19, 1933, the decision and judgment of the state Supreme Court entered June 30, 1934, and the decision and judgment of the Supreme Court of the United States entered November 11, 1935 are conclusive of the matter.

Keeping in mind the fact the state Supreme Court affirmed the reasoning and judgment of the county court, note the reasons which the Dauphin County Court assigns in support of its power to amend the statute by the exercise of the judicial process. The reasons are set forth at length in Commonwealth v. Girard Trust Company (R. 106) 42 Dauphin County Reporter 297, (327 Pa. 135 (1937)) and in its opinion in the instant case. An analysis of these reasons discloses that they not only do not support the conclusion of the court but, rightly understood, invalidate such conclusion.

The intent of the legislature in its enactment of these various statutes, the acts of 1907, 1923, 1927 and 1929; is neither obscure nor latent. In the 1907 statute the legislature prescribed two measures of the tax, one, which is referred to in this brief as the second proviso, was made

applicable to all trust companies; the other, referred to in this brief as the first proviso, was made applicable to such trust companies as had not paid their tax in accordance with the measure prescribed in the second proviso on or before March 1 of each year. The measure of tax in the first proviso permitted no deductions. The taxable value was the net asset value. The second proviso allowed deductions from the value of the net assets. The character of the assets, the value of which was to be deducted, is defined: The deductible assets were the shares of stock of corporations liable to pay a capital stock tax and the shares of stock of which had been taxed. They are precisely those of the 1923 statute. These deductions were allowed, as judicial decision shows, for the purpose of avoiding double taxation, the capital stock of a corporation and the shares of stock issued by such corporation being regarded for taxation purposes as identical. These were the sole deductions allowed by the 1907 and the 1923 statutes until by the Act of 1927 additional deductions were allowed in accordance with the state taxation policy of imposing no tax upon the capital stock of or the shares issued by manufacturing, laundering and meat packing corporations.

Judicial decision declared the express deductions allowed to be the sole deductions. Expressio unius est exclusio alterius. This conclusion has been adhered to by the state Supreme Court. It was declared in the decision of such court in the case of Commonwealth v. Mortgage Trust Co., 227 Pa. 163 (1910) and reaffirmed whenever questioned. In the recent decision in the Provident Trust Company case (Com. v. Provident Trust Co. of Phila., 40 Dauphin Co. Repts. 146 (1935)) the Dauphin County Court, upon whose opinion the state Supreme Court affirmed the judgment of the lower court, (319 Pa. 385) sets forth at length and quotes from the opinion of Judge Sadler in the Hazelwood Savings & Trust Co. case to such

effect (23 Dauphin County Repts. 244; 271 Pa. 375 (1921).) The Provident Trust Company and Hazelwood Savings and Trust Company decisions are reaffirmed by the state Supreme Court in its decision of June 25, 1937, in the instant case. (R. 192.)

The Act of 1923 made the measure of tax of the second proviso of the Act of 1907 the sole measure of the tax. The legislature passed the acts of 1923, 1927 and 1929 in the light of judicial decision declaring the meaning of then existing statutes. Indubitably the act of 1927, in so far as the measure of the tax was concerned, was enacted for the purpose of changing the measure of the tax by allowing additional deductions. The additional deductions were the shares of stock of the corporations which were relieved from the payment of capital stock tax and the shares of stock which were relieved from the payment of tax. The capital stock of and the shares of stock issued by manufacturing, laundering and meat-packing corporations had been exempted from tax under the taxation policy of the state in order to foster their growth. The purpose of the allowance of additional deductions was to exclude the shares of such corporations from the measure of the tax and thereby not tax them. The legislature regarded the inclusion of such shares in the measure of the tax as taxing them and therefore directs their deduction. The Act of 1929 did not change this measure of tax. The foregoing is conclusively established by the decision of the state Supreme Court in the instant case filed June 30, 1934, and the decision of the Supreme Court of the United States filed November 11, 1935.

Additional confirmation of what has been said as to the intent of the legislature is found in the Act of May 31, 1933, P. L. 1132. This act amends the 1929 act and reaffirms the intent declared in the earlier statute, for the amendment sets forth in terms the method of determining the measure of tax whereby the deduction of

the favored shares of stock expressly defined in the 1929 act and these alone is to be made. Such method is that which the taxing officials applied to trust companies in the year 1930 including this appellant.

The Act of July 28, 1936, P. L. 73 enacted since the decision of the United States Supreme Court reaffirms what has been said, for by it the legislature allows no deductions and fixes the measure of tax at the value of the net assets of the corporation.

The 1936 statute and its predecessors of 1907, 1923, 1927, 1929 and 1933 demonstrate the conclusions (1) that the legislature intended the deduction of no assets other than the shares defined in the statutes and expressly allowed thereby, (2) that the prescribing of the measure of the tax is a legislative function, (3) that to increase or to diminish the deductions from the net assets is to amend the statute and (4) that to amend the statute is to legislate, a power vested solely, under the Constitution of the state, in the General Assembly. (Article II of the State Constitution.)

How does the state court arrive at its conclusion? At length and with the citation of numerous authorities and quotations from many decisions the court declares that when the state imposes a tax upon a subject of taxation and does so by the use of what the court styles "all-inclusive" language, the legislature means all of the subject within the state taxing jurisdiction, that the "all-inclusive" language means "all" of the subject within the state taxing power and no more, as, for example, says the court, when the state imposed a tax upon the capital stock of a corporation it meant all of the capital stock, that is all of the assets of the corporation within the state taxing jurisdiction. It did not mean all of the assets owned by the corporation wheresoever situate. Similar illustration does the court use with reference to certain other taxing statutes.

Having arrived at this point, the court concludes that therefore by the Act of 1929 the legislature meant a measure of tax determined by allowing the deduction of all non-taxable assets owned by the trust company, that in addition to the assets directed in express terms to be deducted all non-taxable assets were to be deducted. This includes the deduction of all tangible property, real and personal, located outside of the state, all intangible property such as United States bonds and the bonds and shares of stock of agencies and instrumentalities of the United States government. This, *now* says the court, is what the legislature meant; such we now see, says the court, is its intention by the use of its language though the intention was the contrary from June 13, 1907, the date of the enactment of the 1907 statute, down to and including November 11, 1935, the date upon which the Supreme Court of the United States held the 1929 statute unconstitutional. Though such a contrary intent made the statute unconstitutional, the fact of unconstitutionality, so holds the state court, established a new intent on the part of the legislature in its enactment of this 1929 statute, a new intent which became effective by virtue of the decision and judgment of the United States Supreme Court entered November 11, 1935.

Such ruling by the state court nullifies its conclusion. When we come to apply this rule of "all-inclusive"-language-standard determinative of legislative intent to the Act of 1929 we find that there is no such "all-inclusive" language in the statute. On the contrary the language is restrictive. Certain assets are excluded from the measure of tax and such assets alone. The language of the statute is "so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares."

The state law-making body by the statutes of May 31, 1933, P. L. 1132 and July 28, 1936, P. L. 73 has given express denial to this conclusion of the lower court and to every premise upon which its conclusion has been founded. The 1933 act was in force when the lower court entered its first judgment upon November 24, 1933, with which statute such judgment conformed, for the method of settlement applied under the 1929 statute is prescribed in terms by the 1933 statute.

The invalidity of the conclusion of the state court as to the meaning of the use of general language in a statute and the power of a court to restrict such language by construction is shown by the decision of the United States Supreme Court in Trade-Mark Cases, 100 U. S. 82 (1879).

When one considers the language of the statute and the hereinbefore cited decisions, is it not clear that what the state court has done is to amend the Act of 1929 and that it exercised such power of amendment by its final judgment of January 22, 1937?

To allow additional deductions or to deny all deductions is to change the measure of the tax. To add deductions is to lessen the tax in cases of trust companies owning the kind of assets thus deducted and to discriminate against trust companies and their shareholders owning no such exempt assets. To deny all deductions is to increase the tax. The power to raise or lower tax is the power to determine tax liability; it is the power of taxation. Such power is vested in the legislature alone.

The state court has amended the statute by adding words of limitation thereby changing the measure of the tax. It has put words in the statute which were intentionally omitted, for the language of the statute and judicial decisions declare that the sole deductions were the shares of stock defined in the statute. As in the 1907, 1923 and 1927 acts so in the Act of April 25, 1929, P. L. 673 were the deductions confined to the shares of stock

defined in the express terms of each of these statutes. (Commonwealth v. Trust Co., 227 Pa. 163 (1910); Commonwealth v. Trust Co., 237 Pa. 353 (1912); Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921); Commonwealth v. Schuylkill Trust Co., 315 Pa. 429 (1934); Commonwealth v. Provident Trust Co., 319 Pa. 385 (1935); Schuylkill Trust Co. v. Commonwealth, 296 U. S. 113 (1935).)

To change the measure of tax is to legislate. A court "cannot put words into an act which the legislature has omitted—and, presumably, designedly so— for the purpose of making it valid. That would be legislation—making the law rather than declaring it. In other words, the power to strike an unconstitutional clause out of an act is a very different thing from the power to insert one in an act to make it constitutional. The one is judicial, the other legislative." (Dundee Mortge. etc. Invest. Co. v. School Dist., 21 Fed. 151 (1884),) ". . . courts cannot by an act of judicial legislation add words of limitation to a statute expressed in general terms in order to sustain it, when its operation on the subject-matter embraced in its terms is unconstitutional." U. S. v. Reese, 92 U. S. 214 (1876); U. S. v. Steffens, 100 U. S. 82 (1879); U. S. v. JuToy, 198 U. S. 253 (1905); Anderson v. Louisville, etc. R. Co., 62 Fed. 46 (1894); Chicago, etc. R. Co. v. Westby, 178 Fed. 619 (1910); Illinois Cent. R. Co. v. McKendree, 203 U. S. 514 (1906).

In the Trade-Mark Cases, 100 U. S. 82 (1879) it was held that "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear", that there is no power in the court to introduce words of limitation into a statute in order to make it specific and thereby constitutional.

In the instant case there is not even a pretense that the words of the 1929 state statute convey or were in-

tended to convey the meaning given to this statute by the Dauphin County Court in its new judgment. Decisions of the Dauphin County Court and of the state Supreme Court and of the Supreme Court of the United States are expressly to the contrary. Words are put into the statute solely because the statute has been held unconstitutional. Would the new meaning and intent have been given if the Supreme Court of the United States had not held the statute unconstitutional? Because the statute is unconstitutional the state court proceeds to amend it because the court is of the opinion that by introducing words of limitation changing the measure of the tax, the statute becomes constitutional. This is not judicial process. It is judicial legislation. It is the exercise of law making power by a court which acquired appellate jurisdiction under Article XI, Section 1104 of the Fiscal Code, state statute of April 9, 1929, Pamphlet Laws 343. It is legislation upon a subject which is within the sole province of the legislature, namely, the exercise of the sovereign power of taxation. The court has no power of legislation and therefore its judgment is void and, though it had the power of legislation, the statute as it has been amended is unconstitutional and void. These conclusions are argued herein and reference is made to pp. 55-64 of this Brief. Doubtless when the statute is again declared unconstitutional the state courts will proceed to amend it again in such respect as in its opinion will make the statute constitutional and so on ad infinitum. This is the necessary consequence of the assumption of legislative power, for if the state courts have the power to amend this statute once, there is no limitation upon their power to do so any number of times and in such manner and with such regard as they choose.

As was said in Davis v. Wallace, 257 U. S. 478 (1922) so with reference to the instant judgment: ". . . to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally

be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these . . . corporations belong. Of course we cannot so hold." In this case the United States Supreme Court said ". . . . an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." The judgment of the state court is not "a constitutional enactment".

The state courts have declared an intent on the part of the legislature in the enactment of the statute which, as hereinbefore pointed out, is not only contrary to the language of the statute, their prior decisions, but also to the decision of the United States Supreme Court in this case. This court has said in its analysis of the statute and its review of the decision and judgment of the state Supreme Court (296 U. S. 113):

> "We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the state, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect.
>
> "It is clear that the tax is not measured by each shareholder's aliquot proportion of all the assets of the company."

Continuing its analysis of the intent and meaning of the statute this court said, inter alia, "The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax

them twice." Continuing the Court says: "The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them because to include them in the base would be in effect to tax them a second time." This Court, it is seen, declared what the law does, what the legislature has done by this statute. Federal questions being involved, this court declared the meaning and intent of the state legislature, its operation and effect, and held the statute void. Interpretation and construction of the statute ceased at this point. Judicial process thereafter was confined to compliance with the decision. The constitutional defects of a state statute can be cured by nothing short of a constitutional enactment by the state law-making body.

The state courts under the guise of obeying the mandate of the United States Supreme Court amend the statute by judicial decree. This is error. This is judicial legislation.

The opinions of the state courts indicate that they predicate their authority to amend the statute upon the dissenting opinion (296 U. S. 113). Such interpretation of the dissenting opinion is unwarranted.

The dissent is founded upon an erroneous conception of the provisions of the 1907 statute. The writer of the dissenting opinion states: "The attack is thus confined to amendments of the act which were placed upon the statute books in three years, (1923, 1927, 1929), for there was no deduction of any kind under the act as first adopted in 1907." This is an erroneous statement as a reading of the provisions of the Act of 1907 discloses and as the decisions of the state Supreme Court cited in the opinion of the Supreme Court of the United States, to wit, Commonwealth v. Trust Co., 237 Pa. 353, 355, 356 (1912) and Commonwealth v. Hazelwood Savings & Trust Co., 271 Pa. 375 (1921), both of which decisions construed the

1907 act, affirm. (See also Commonwealth v. Mortgage Trust Co., 227 Pa. 163 (1910).)

The main provision of the 1907 act, referred to in this Brief as the second proviso, directs the deduction of "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares". This measure of tax is in precise terms that of the Act of 1923. It is in the first proviso of the 1907 statute that the measure of tax is fixed at the net asset value of the shares *but* this first proviso is not applicable until after March 1 of each year and then to such trust companies only as have not paid their tax on or before such first day of March, at which time there may be none such. This first proviso is the conditional proviso of the statute, not being applicable until after March 1 and then to such trust companies only as have not paid the tax measured by the second proviso. The first proviso increases the tax by denying deductions and also denies the exemption from other taxation allowed when the tax is paid on or before March 1 under the second proviso. (Commonwealth v. Trust Co. of Pgh., 237 Pa. 353, 355 (1912).) This second proviso cannot be stricken from the statute without striking from the statute the effect of its application, for the statute provides that if the payment of the tax be made on or before the first day of March in each year "the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

Any suggestion of choice of method of removing the established discrimination by judicial process is faulty. There is no distinction between the 1907 statute and the acts of 1923, 1927 and 1929, for the same discrimination exists under each of these statutes, the first act of 1907 and the succeeding acts of 1923, 1927 and 1929. Hence it is that any conclusion that the 1907 act is a valid enactment, that the invalidity of the 1923, 1927 and 1929

statutes reestablishes the imposition of a valid tax under authority of the 1907 statute is unsound. So the state courts have ruled for the petition of the Commonwealth was denied because of the unconstitutionality of these statutes (R. 100, 106.)

Let us analyze this dissent in the light of the rationalization of the state courts and the contention of the Commonwealth made in support of its petition for the imposition of the tax under the first proviso of the Act of 1907.

The dissent cites Eberle v. Michigan, 232 U. S. 700, 705 (1914); Davis v. Wallace, 257 U. S. 478, 484, 485, (1922); Truax v. Corrigan, 257 U. S. 312, 342 (1921), in support of the proposition that the acts of 1923, 1927 and 1929 are amendatory of the Act of 1907, "separable, even though invalid, . . ." This seems to lead to the conclusion that the Act of 1907 thereby becomes law. The invalidity of the 1907 act has been shown. The dissent concludes that the *state* has a choice. It is said, "If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. . . . On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force."

Observe that what the dissent holds is that the state has such choice. The state courts, however, proceed to amend the 1929 statute by judicial decree with the thought that by an amendment allowing additional deductions and by its "book-value-permanent-investments-flat and proportionate deduction method of settlement" they have changed the measure of tax and thereby removed the discrimination. The procedure followed by the Dauphin County Court not only violates the decision of the United States Supreme Court, state and federal constitutional provisions, but also runs counter to the dissent. The lower court

admits the unconstitutionality of the acts of 1907, 1923, 1927 and 1929, holds them void as enacted and then proceeds to amend the 1929 statute and to apply it to the appellant as amended, though manifestly what the writer of the dissent meant, by saying that the state must either maintain the deductions or cancel them altogether, was that the state had to choose between one or the other method by the enactment of a constitutional statute operating prospectively.

The Commonwealth urged judicial legislation denying all deductions. (R. 94.) It said that, since the acts of 1923, 1927 and 1929 are unconstitutional as is the second proviso of the 1907 act, the court should hold the first proviso of the Act of 1907 valid and impose tax thereunder, thereby denying all deductions and depriving trust companies and their shareholders of the exemption from other taxation allowed upon payment of tax imposed by the second proviso. The insuperable difficulty here is that the second proviso of the Act of 1907 is the main provision of the statute, that without it the legislature would not have passed the statute, (Com. v. Trust Co., 237 Pa. 353, 355 (1912).) that the second proviso was a part of the act at the time of its enactment and that the decisions cited in the dissent (Eberle v. Michigan, supra, Davis v. Wallace, supra, and Truax v. Corrigan, supra) establish conclusively that the Act of 1907 is void in its entirety upon the same grounds which made void the later statutes. So the state courts held.

No court can amend the 1929 act by adding words of limitation, as do the state courts, nor can any court strike from the 1907 statute a provision which was in the statute when it was enacted, there being no doubt that the legislature intended that the meaning of the other provisions was to be restricted accordingly, as the Commonwealth asked the Dauphin County Court to do. What the state courts have done is to amend the statute by changing the

measure of the tax, thereby exercising a law-making power. What the Commonwealth petitioned the Dauphin County Court to do was to amend the 1907 statute by striking therefrom the unconstitutional second proviso and to sustain the statute thus mutilated, an act which is likewise the exercise of law-making power, similarly without constitutional authority.

If such power did exist in any court it could constitutionally be made to operate prospectively only, for a method of taxation could not be applied to the appellant differing from that applied to all other trust companies in the same tax year without violating the uniformity clause of the state constitution (Article IX, Section 1) and the due process of law and equal protection of the laws clauses of the Fourteenth Amendment to the United States Constitution. Such state and federal constitutional provisions are violated by the judgment of the lower court applying its new conception of legislative intent in the enactment of the 1929 statute. (Commonwealth v. Del. Div. Canal Co., 123 Pa. 594, 623 (1889), Appeal of Fox and Wife, 112 Pa. 337, 353 (1886), Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, 560 (1902), Frost v. Corporation Commission, 278 U. S. 515 (1929).)

The measure of tax prescribed in the 1929 statute was in furtherance of the legislative policy to avoid double taxation and to foster the growth of manufacturing, laundering and meat-packing corporations. Obviously to change the measure of tax is to change the policy of the state. Such power is in the state legislature alone.

To apply the measure of tax of the conditional first proviso of the 1907 act without the limitation of the second proviso of the same act is to legislate by prescribing a measure of tax which the legislature never mandatorily applied to trust companies. Such amendment deprives the shares issued by the trust companies and so much of the capital stock, surplus, profits and deposits of

the trust companies as shall not be invested in real estate of the exemption "from all other taxation under the laws of this Commonwealth", an exemption confined to and granted solely by this second proviso, an exemption which is the effect of the payment of the tax under the acts of 1923, 1927 and 1929. To hold that this second proviso with its measure of the tax and with the exemption from all other taxation upon compliance with the terms can be stricken from the act upon the ground that the legislature would have passed the 1907 statute without it is to hold that the legislature did not pass the act as an entirety and is to contradict every legislative act relating to the taxation of trust companies and their shares and to negative the express ruling of the state Supreme Court in Commonwealth v. Trust Company, supra, 237 Pa. 353, 355 (1912).

To choose to amend by allowing additional deductions is likewise to change the legislative policy by changing the measure of tax. Again we see that such change is an act of legislation. Whichever alternative is chosen, the change is a change in the law.

Courts have no such power of choice. Such power of choice cannot be exercised by judicial decree changing the measure of tax. What is the source of such power of choice in a court? Where is the standard in accordance with which the choice is to be made? In the 1929 act? If not there, where?

To exercise such choice without an objective standard prescribed by the legislature is arbitrary. No administrative or judicial officer has the power to exercise a personal choice, an undefined and ungoverned discretion. If the standard exists, is it to be found in the 1929 statute? So, seemingly, the state court holds, for it is such statute which it changed and as changed applied to the appellant by making a new tax settlement founded upon a new and a different state of facts from that upon which the original settlement was founded. A reading of the statute shows

that no standard is to be found within its provisions, for each of the stated alternatives of choice was designedly omitted from the statute.

The legislature did not delegate such power of choice to the courts by the 1929 act and if it had, it would be an unconstitutionl delegation of law-making power. Schechter v. United States, 55 Supreme Court Reporter, 837 (1935). Has not the state legislature exercised its powers of choice by the Act of July 28, 1936, P. L. 73, a statute effective in the year 1936, and therefore not applicable to the year here in question?

It is respectfully submitted that the judgment of the state Supreme Court is judicial legislation, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

4. There is an intended and actual taxation of and a discrimination against United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds by this statute as it has been construed in the tax settlement made against the appellant and embodied in the final judgment of the Supreme Court of Pennsylvania.

The new judgment is unconstitutional because the statute under the alleged authority of which it entered such judgment is unconstitutional. The new judgment is unconstitutional also because it violates the due process of the law and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States and the federal statutes recited in the Assignments of Error and thereby establishes the unconstitutionality of the 1929 statute upon the same grounds. This is demonstrated by the judgment itself.

What is the formula which this new judgment applies? What are its ingredients? What are the principles upon which it is founded? To learn the answer to these

questions one must turn to the cases of Commonwealth v. Provident Trust Company of Phila. (40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935)). By these decisions this new method was applied to the Provident Trust Company for the years 1928, 1929 and 1930 the last of which is the year here in question, the statute imposing the tax in 1928 being the 1927 act and in the years 1929 and 1930 the Act of 1929. The measure of tax in the 1927 and 1929 statutes is the same.

That the decision in the Provident Trust Company case is unconstitutional is evident upon a reading of the opinion of the Supreme Court of the United States. The latter court referred to the Provident Trust Company decision in the body of its opinion and in marginal notes 13 and 14.

By this decision in the Provident Trust Company case, supra, it was recognized that not only were national bank shares to be deducted but that the federal reserve bank shares were to be deducted from the value of the net assets at their full value, i. e. "flat", without any necessity on the part of the trust company to establish the fact that such shares were purchased out of the amount of capital paid in, surplus and undivided profits, though the court did hold that such shares fall within the statutory language defining the class of exempt and deductible assets. Here is patent discrimination against the non-taxable assets deducted "proportionately".

The sole difference between the formula and calculation applied in the Provident Trust Company case and that applied by this new judgment in the instant case lies in additional deductions consisting of non-taxable assets which in the instant case consist of United States bonds and bonds of federal agencies and instrumentalities, the deduction of which is made by a "proportionate" method of settlement.

In this cited decision and its second decision upon exceptions in the same case we learn that the entire formula and method of settlement designed to be applied to all trust companies is founded upon a presumption, a presumption which may be substantiated by fact in the case of one or more companies in any one year and in the case of none other. Here we read that it is a "fair presumption" that all of the capital stock, surplus and undivided profits are "permanent investments", that all other investments are of deposits (40 Dauphin Co. Repts. 169), that all bonds and shares of stock are "permanent investments", and therefore all of the capital stock, surplus and undivided profits consists of bonds and stocks (41 Dauphin Co. Repts. 4), that "commercial paper" and "quick assets" (an undefined term) (40 Dauphin Co. Repts. 169) and notes (41 Dauphin Co. Repts. 4), are not "permanent investments", that "the short term investments such as notes are made out of deposits" (41 Dauphin Co. Repts. 4) which may however include also "permanent investments" if the amount of the "permanent investments" is in excess of the capital stock, surplus and undivided profits (40 Dauphin Co. Repts. 169; 41 Dauphin Co. Repts. 4). Presumption upon presumption, without a fact in their support. This is the general rule founded upon the "fair presumption" in a particular case. Apparently the invalidity of arguing from a presumption based upon a presumption and from a particular to a general conclusion is overlooked by the court. (40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935).)

Now turn to the instant case and note the result. The opinion of April 24, 1936 declares the formula. The formula is set out in full on page 320 of 42 Dauphin Co. Repts. (317) (a) (b) (c) (d). The judgment of January 22, 1937 (43 Dauphin Co. Repts. 260, 261) finally applies it though to learn the mechanics of the calculation one

must look for it in the opinion filed January 18, 1937 (43 Dauphin Co. Repts. 258, 259, 260). (R. 100, 152.)

Observe what is done. National bank shares are deducted "flat". None other is so deducted. What of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds? What of shares exempted by the terms of the statute of 1929? They are deducted proportionately by the formula applied by the following calculation:

$$\frac{418{,}650}{2{,}158{,}045} \times 286{,}121 + 35 = \$\,55{,}541$$

What do these figures represent? What are they in reality? The numerator, 418,650, is defined by the court on page 320 of 42 Dauphin Co. Repts. (317) in subparagraph 2(a), also on page 322. (R. 102, 104).

The denominator, 2,158,045, by subparagraph 2(b), page 320 and also on page 322. (R. 102, 104).

The multiplicand, 286,121, by subparagraph 2(c), page 320 and also on page 322. (R. 103, 104).

The figure 35 by subparagraph 2(d), pages 320 and 322. (R. 103, 105).

The numerator therefore is the book value of capital stock, surplus and undivided profits less book value of national bank shares which are deducted "flat".

The denominator therefore is the book value of all permanent investments less book value of national bank shares which are deducted "flat".

The multiplicand is said to be the book value of the shares to be apportioned. (42 Dauphin Co. Repts. 320 (c)) (R. 103). This is changed by the addition of the alleged book value of the United States securities, Philippine

Islands bonds and Joint Stock Land Bank bonds. (42 Dauphin Co. Repts. 322 (c)) (R. 104).

The result, $55,541., is said to be the actual value deducted by reason of the ownership by the applicant of exempt shares defined in the statute (not including national bank shares) of the value of $135,787. and United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of the value of $151,208. (R. 17.) The actual value, $55,541., is determined by the application of such book value fraction to such book value multiplicand and is converted from a book value into an actual value by the addition of the figure, 35, which is said be an appreciation (See 43 Dauphin Co. Repts. 258, 259) to which the fraction is not applied. All of this is explained in the Opinion filed April 24, 1936 and again in the Opinion filed January 18, 1937. (R. 100, 152).

The language of the court is clear upon the following points, to wit, the denominator of 2,158,045 is said to be the "book value" of all "permanent investments" exclusive of an alleged "book value" of the national bank shares, "permanent investments" consist of bonds and stocks, hence the denominator of 2,158,045 includes the alleged "book value" of the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds. Thus it is manifest that the federal securities are taxed and discriminated against.

By this formula and calculation the federal securities are included in the base and measure of the tax. The denominator is increased by the inclusion of their value.

The greater the denominator the less is the result of its application to the exempt multiplicand value of $286,121. and the less the exemption or deduction allowed. The less the deduction the greater the tax imposed and the judgment entered. Is this not a mathematical demonstration of the fact that the United States securities are included in the base of the tax, that the tax liability and the tax burden is increased by reason of their ownership?

The conclusion of law 5, (Opinion, April 24, 1936, 42 Dauphin Co. Repts., 317, R. 104), declares that the value of the United States securities and the securities of federal agencies and instrumentalities is not to be deducted though the full value of other assets is deducted. The full value of national bank shares are deducted "flat" and the full value of federal reserve bank shares are deducted "flat", (Commonwealth v. Provident Trust Company, 40 Dauphin Co. Repts. 146 (1935); 41 Dauphin Co. Repts. 1 (1935); 319 Pa. 385 (1935), Com. v. Girard Trust Co. R. 106; 327 Pa. 135 (1937)), irrespective of whether or not it be established as a fact that they were purchased out of capital stock, surplus and undivided profits. Manifestly there is discrimination against these non-taxable United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds which are deducted "proportionately".

This new method of settlement applies the proportionate method of deduction as did the method applied to trust companies in the year 1930. The new differs from the old in its use of "book values" and a new factor styled "permanent investments". In both methods tax is imposed upon and tax liability is increased by reason of the trust companies' ownership of non-taxable federal bonds and the bonds and shares of stock of federal agencies and instrumentalities. In both the non-taxable federal assets "are figured in the base of the tax", and therefore as this court said, "it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely and by reason of ownership of such federal securities." If to avoid the taxation of national bank and federal reserve bank shares and a discrimination against them their value must be deducted "flat", i. e. their full value must be deducted from the value of the net assets, is not the partial deduction of the federal securities a taxation of the portion not deducted? If national bank shares, and other assets held exempt under the express terms of

the statute are deducted "flat", i. e. at their full value, are not the partially deducted non-taxable federal securities discriminated against?

Turn to the method of settlement applied by the taxing officials and approved by both state courts. (November 24, 1933 and June 30, 1934). Observe that the figures are all actual values, all set forth in the sole facts before the courts (R. 14, 18).

Turn now to the method of settlement applied by the court in its new judgment of April 20, 1936 explained in the opinion filed April 24, 1936 (R. 100). Observe that the explanation of the method calls for the use of book values and the value of undefined "permanent investments" while the calculation actually applied in this judgment uses actual values. Thus the theoretical formula and the calculation determinative of the judgment entered are contradictory. If the theory be valid, the judgment is invalid. Later the court holds this judgment invalid and proceeds to make it conform to its theoretical formula by its judgment of January 18, 1937. Let us analyze this later judgment.

The judgment of January 18, 1937, says the court, is based on "book value" and the "permanent investments" factor, figures and factors involving values. Of these values there is no evidence. Realizing this fact, the court without hearing and without authority introduces new evidence and changes the facts. It says it got the figures from a report. This is not in evidence. This is done in violation of the 1929 statute, and in violation of judicial decision. It is contrary to its answer to the appellant's Exception 5. (R. 129, 160). This point has been discussed hereinbefore and will not be repeated. Tax cannot be imposed by the use of any values other than actual values. Such values are set forth in the Stipulations (R. 14, 18). What "permanent investments" are does not appear. The term is not defined. It is not an ingredient of the

statute. What is significant furthermore is that the "permanent investment" values are not actual values.

Based upon alleged facts not in evidence, not applied by the taxing officials in the original settlement affirmed by the judgments of the state courts and reversed by the United States Supreme Court, the new judgment stultifies itself; it is said to be a revision of the original judgment in obedience to the mandate of reversal, yet it changes the facts and amends the statute in patent violation of the mandate.

The final judgment of January 22, 1937 differs from the judgment of January 18, 1937 solely in the interest calculation, the factors and valuations in both are the same.

At this point attention is called to the extent of the discrimination exemplified and established in the judgment in the Provident Trust Company cases, 40 Dauphin County Repts. 146, 177, 182 (1935); 41 Dauphin Co. Repts. 1 (1935). The Provident Trust Company settlements and appeals covered the tax years 1928, 1929 and 1930. The tax year in question in the Schuylkill Trust Company case is that of 1930. Turn to the final judgment of the Dauphin County Court, 41 Dauphin Co. Repts. 1, at pages 8 to 12, incl. The actual value of the net assets is $21,385,884. The deductions allowed totalled $7,080,330. Tax is imposed upon the difference between these two sums, to wit, $14,305,554. The allowance of a deduction of $7,080,330. for one tax year is a reduction of tax for such period in the amount of $35,401.65. The deductions allowed were in excess of thirty-three per centum of the value of the net assets of the trust company. Tax was measured by an asset value less than two-thirds of the net asset value. In cases of trust companies owning no favored exempt shares of stock under the express language of the statute tax is measured by their full net asset value.

The net asset value of the Schuylkill Trust Company ($466,914.) is two and one-tenth per centum of the net

asset value of the Provident Trust Company ($21,385,884). The deduction allowed the Schuylkill Trust Company ($8,886.) is twelve-one hundredths of one per centum of the Provident Trust Company's deduction of $7,080,330. Note that the value of the net assets of the Provident Trust Company ($21,385,884) is upwards of 46 times that of the Schuylkill Trust Company ($466,914.) and that the deduction allowed the Provident Trust Company ($7,080,330.) is 793 times the deduction allowed the Schuylkill Trust Company ($8,886.) under the judgment of this court entered June 30, 1934 and is 93 times the deduction allowed under the new tax settlement and judgment of the Dauphin County Court ($75,743.) entered January 22, 1937.

Turn now to the Girard Trust Company judgment (R. 106) (42 Dauphin Co. Repts. 297 (1936). The actual value of the net assets of the Girard Trust Company was fixed at $22,062,513. The total deductions allowed were $12,201,893. The measure of tax was the difference between these two amounts, to wit, $9,860.62. The tax imposed amounted to $49,303.10. The tax deduction and exemption allowed was $61,009.46. Trust companies owning no such favored assets were taxed upon the full net asset value. Any such trust company whose net assets were the equivalent of the Girard Trust Company's is subjected to tax in the amount of $110,312,565. Note that the total deduction allowed ($12,201,893.) is in excess of fifty-five per centum of the net asset value ($22,062,513.) The tax was imposed by a measure of tax of less than forty-five per centum of the value of the net assets. The value of the net assets of the Girard Trust Company ($22,062,513.) is 47 times that of the Schuylkill Trust Company ($466,914.) while the deduction allowed the Girard Trust Company ($12,201,893.) is more than 1373 times that allowed the Schuylkill Trust Company ($8,886.) under the judgment of this court entered June 30, 1934 and is more

than 161 times the deductions allowed under the new tax settlement and judgment of the Dauphin County Court ($75,743.) entered January 22, 1937.

Comparing the methods of settlement and the effect thereof as established by the judgments in the Provident Trust Company case and in the Girard Trust Company case, we find that while the value of the net assets of the Girard Trust Company ($22,062,513.) exceeds the value of the net assets of the Provident Trust Company ($21,385,884.) in the amount of $816,009., the deduction allowed the Girard Trust Company ($12,201,893.) exceeds the deduction allowed the Provident Trust Company ($7,080,330.) in the amount of $5,121,563. The excess deduction allowed the Girard Trust Company in the amount of $5,121,563. is more than 6 times the excess of the value of the net assets of the Girard Trust Company over the value of the net assets of the Provident Trust Company ($816,009.).

The total amount of deductions allowed the Provident Trust Company was $7,080,330., $6,929,696. of which was a "flat" deduction and the remainder, $150,634., was a "proportionate" deduction. The entire amount of such deductions consists of the shares of stock defined in the statute. The total amount of deductions allowed the Girard Trust Company was $12,201,893., $877,141. of which was a "flat" deduction for shares of national bank and Federal Reserve Bank stock and the remainder, $11,324,752., was a "proportionate" deduction covering exempt shares of stock defined in the statute and United States securities. What the full value of these assets is for which a "proportionate" deduction was allowed does not appear by the opinion and judgment of the court. A point to be observed in this connection is that the Girard Trust Company might have secured a deduction of the full value of these assets for which a "proportionate" deduction was allowed in the amount of $12,201,893. had these assets been "earmarked and set up" as investments "made out of the capital account" (41 Dauphin Co. Repts. 3), for it was

recognized in the Provident Trust Company case that by so earmarking and setting up exempt assets the right to a "flat" deduction is established. (See Commonwealth v. Provident Trust Co. of Phila., 40 Dauphin Co. Repts. 146, 166 (1935); 41 Dauphin Co. Repts. 3 (1935); 319 Pa. 385 (1935).)

These comparisons disclose gross discrimination and inequality. Here is an entire lack of uniformity. The appellant owned United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds of a value of $151,207. Under the settlement of tax and judgment of the state courts 19 per centum of their value was deducted. Had the appellant invested this sum in Federal Reserve Bank shares or national bank shares or both, the entire sum of $151,207. would have been deducted with a consequent reduction of tax liability. Surely a taxing statute productive of such results cannot be made constitutionally valid by labeling the tax imposed by the statute a tax upon shares of stock issued by trust companies.

It is submitted that under this new application of a new meaning and intent ascribed to the legislature by its enactment of the 1929 statute, the statute is likewise unconstitutional and void upon the same grounds as those upon which this Court held it unconstitutional and void.

5. If the tax imposed by the statute as construed and applied in the tax settlement made against the appellant is a tax upon shares qua shares, a personal levy against the shareholders, the state is without constitutional authority to impose such tax upon the shares owned by non-residents of the state.

This new judgment imposes the tax upon the shares of the trust company owned by non-residents. The judgment is invalid for the reasons urged in this respect at the original argument resulting in the decision filed November 11, 1935. Such taxation violates the due process and

equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, for it is the taxation of property whose situs is in states other than Pennsylvania. The 1929 statute is a revenue statute. It is not a statute regulating the issues of shares of stock of trust companies and thereby fixing their taxable situs. Hence Corry v. Baltimore, 196 U. S. 466 (1905), is not in point.

The contention of the appellant that, if the tax be one upon shares as such, the Commonwealth is without authority to impose and collect a tax upon shares owned by residents of states other than Pennsylvania, was argued and discussed in the Brief of Appellant filed with this court in the appeal to No. 3, October Term, 1935 and reference is made upon this point to such Brief of Appellant.

This court held with reference to this contention that "In view of the grounds of our decision we find it unnecessary to pass upon this contention", thus indubitably demonstrating that this court held the 1929 statute unconstitutional and void.

The contention of the appellant is renewed and reference is made to the Brief heretofore filed with this court.

It is respectfully submitted that the exclusive situs for the taxation of shares of stock is the domicile of their owner and that the taxation by the state of Pennsylvania of shares of stock owned by non-residents of the state is forbidden by the Fourteenth Amendment to the Constitution of the United States.

Before leaving the consideration of this judgment observe that the state court has imposed an interest charge upon costs awarded the appellant by the mandate of this court in the amount of $344. The decision of this court was filed November 11, 1935. These costs at the latest were owing as of such date. The state court charges in-

terest to January 22, 1937, and upon such date credits the appellant with such sum of $344., thus charging interest on such sum at the rate of 6 per centum from November 11, 1935 to January 22, 1937. The judgment of this court was definitive. Such costs were payable as such and are not paid by a credit allowance upon a non-definitive judgment of a state court.

VI. Conclusion.

State administrative officials and the state Supreme Court heretofore never expressed a doubt as to the meaning and intent of these acts of 1907, 1923, 1927 and 1929. Neither the tax collectors nor the court varied from the conclusion that the sole deductions allowed by these statutes are the shares of stock defined in terms by their provisions.

Deductions in addition to those allowed by the acts of 1907 and 1923 were allowed when the legislative enactments of 1927 and 1929 expressly granted them; not before. Legislative enactment in the furtherance of the state taxation policy determined their allowance. Being exemptions, administrative officials and state courts confined their allowance strictly in accordance with the words of the statutes.

Legislative history is to the same effect. A reading of these statutes in the order of their enactment demonstrates the same truth. Additional deductions were the result of legislative enactments. The later statutes of May 31, 1933, Pamphlet Laws 1132 and July 28, 1936, Pamphlet Laws 73 confirm the fact that to add to or to subtract from the deductions expressly granted in the statute of 1929 is to legislate and that such function is that of the General Assembly of the Commonwealth.

The opinion of this court and of the dissent is the same as to the extent of the deductions allowed by the statute. All members of the court were in accord in the

view that the 1929 statute allowed no deductions other than those expressly granted. They differed in the effect of the United States Constitution. This court reversed the judgment of the state court because it was founded upon a statute which was discriminatory, therefore unconstitutional and void. The dissent agreed that the judgment was invalid; agreed that the statute was discriminatory but expressed the view that the discrimination was not hostile.

That the United States Supreme Court upon appeal, federal questions being raised, is the final arbiter as to the effect of the United States Constitution and federal statutes is a proposition which is not debatable. A contrary conclusion is destructive of the federal government. Under a contrary conclusion congressional statutes and the United States Constitution become what the court of last resort of each of the states thinks them to be.

There must be uniformity in the application of constitutional provisions. Finality and uniformity in the application of federal constitutional provisions are not to be found in forty-eight different and independent state courts.

There must be an end to the exercise of the judicial function and the operation of the judicial process in a particular case, otherwise the judicial administration of justice becomes destructive of its purpose and, in cases where the state with its limitless resources is a party in a proceeding against an individual citizen or a group of citizens or a corporation, it becomes an instrument of oppression. If there be power to do that which the state court has done in this case by its latest judgment, it has the same power upon reversal of this, its latest tax settlement and judgment, to express another and different view as to the meaning and intent of the legislature in the enactment of the statute, thereupon make another tax settlement and direct the entry of another judgment which must be pursued

from court to court until it again comes before this court. This process may continue throughout the life of the state and not end until either the estate of the person is exhausted or the corporate body bankrupt. The mandate of the Supreme Court of the United States cannot be made the means productive of such results.

This court was the final judge of the federal questions raised, the nature and operation of the tax imposed by the 1929 statute and the effect of the federal statutes and of the provisions of the United States Constitution. No state court has the power to alter such decision. The Act of April 25, 1929, Pamphlet Laws 673, is void and the judgment based thereon is void for this court has so decided.

It is submitted that the 1929 statute is unconstitutional and void as it has been construed and applied against the appellant by the new judgment entered against it.

Under this new judgment, as under the old, the thing taxed in form is not the subject aimed at; if it were, tax liability would not vary by reason and because of the nature of the assets owned by the trust company which issues the shares of stock.

Under the new construction of the state statute, it is submitted, non-taxable assets owned by trust companies are subjected to burdens by reason of their use as a measure of value to which the rate of tax is directed to be applied. They are discriminated against by their use as a measure of value and the elimination and non-use of Federal Reserve Bank shares and national bank shares and other assets deducted at their full value. These burdens and discriminations are not by chance; they are intended, as the formula and calculation applied by the judgment disclose.

Under the new construction of the state statute, it is submitted, the mathematical calculation used and embodied in the judgment establishes the fact that the statute

as construed and applied prescribes a different rate of tax for each member of the class of trust companies made subject to the act, the rate varying as the nature of the assets owned changes and deductions are made by either the "flat" or the "proportionate" method, though the value of the assets and of the shares remains the same.

It is submitted, that such taxation is beyond the power of the state to impose, that, irrespective of any provision of a congressional statute or of the Constitution of the United States, such system of taxation by a state is beyond its power because it infringes upon the paramount sovereignty of the United States.

It is respectfully submitted that the said Act of April 25, 1929, Pamphlet Laws 673 is unconstitutional and void, that the judgment of the state Supreme Court should be reversed and that judgment should be directed to be entered in favor of the appellant with costs.

JOHN ROBERT JONES,
Counsel for the Appellant.

APPENDIX.

Act Approved June 13, 1907, P. L. 640.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . . and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . . : And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

Act Approved July 11, 1923, P. L. 1071.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . . ; and thereupon it shall be the duty of the Auditor

General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together *so much of* the amount of capital stock paid in, the surplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. . . .: And provided further, That in case any such company shall . . . pay said tax into the State Treasury . . . *as hereinbefore provided,* the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth."

ACT APPROVED MAY 7, 1927, P. L. 853.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . .; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, *or relieved from the payment of capital stock tax* or tax on shares, and dividing this amount by the number of shares. . . .: And provided further, That *upon the payment of the tax fixed by this act* into the State Treasury the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth."

ACT APPROVED APRIL 25, 1929, P. L. 673.

"Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled . . .; and thereupon it shall be the duty of the *Department of Revenue* to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. . . . Provided . . . That upon the payment of the tax fixed by this act into the State Treasury, *through the Department of Revenue,* the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth."

The following are pertinent portions of the state statute under authority of which the national bank shares owned by the appellant were taxed:

ACT APPROVED APRIL 25, 1929, P. L. 677.

"Section 1. Be it enacted, &c., That from and after the passage of this act every bank or savings institution having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, shall, . . . It shall be the duty of the *Department of Revenue* to assess such shares for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State, that is to say, at the rate of four

mills upon each dollar of the actual value thereof; the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . .; Provided That in case any bank or savings institution having capital stock, incorporated under the law of this State or of the United States, shall collect, annually, from the shareholders thereof said tax of four mills on the dollar upon the actual value of all the shares of stock of said bank or savings institution, according to the rule hereinbefore stated, that have been subscribed for or issued, and pay the same into the State Treasury, *through the Department of Revenue,* on or before the first day of March in each year; the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempt from local taxation under the laws of this Commonwealth; and such bank or savings institution shall not be required to make any report to the local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon."

ACT OF CONGRESS FEBRUARY 6, 1905, (c. 453, 33 Stat. 689).

"Be it enacted . . . That all bonds issued by the government of the Philippine Islands, or by its authority, shall be exempt from taxation by the Government of the United States, or by the government of the Philippine Islands or of any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia."

ACT OF CONGRESS JULY 17, 1916, (c. 245, 39 Stat. 380, Section 26).

"Sec. 26 . . . farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

". . ."

REVISED STATUTES OF THE UNITED STATES, Section 3701; UNITED STATES CODE, Title 31, Section 742.

"Except as otherwise provided by law, all stocks, bonds, Treasury Notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 447.

SCHUYLKILL TRUST COMPANY,
Appellant,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Supplemental Brief of Appellant.

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I. Argument.

Because of the time at which copy of the Appellee's brief was received by the appellant the court gave permission to the appellant to file a supplemental brief.

The Commonwealth argues in its brief that the judgment of the state Supreme Court is invalid and should be reversed because it constitutes judicial legislation. Such is the view of the appellant.

The Commonwealth argues that judgment should be entered against the appellant for tax under authority of the Act of June 13, 1907, P. L. 640. The invalidity of such conclusion is discussed in the Brief of Appellant and by the state courts. The state courts held that the 1907 act was unconstitutional upon the same grounds as was the act of April 25, 1929, P. L. 673.

The Commonwealth also argues that the judgment of the state Supreme Court is valid and should be affirmed. This last contention of the Commonwealth denies the validity of the first two as the first two deny the validity of the third.

The Commonwealth says the judgment of the state Supreme Court is valid and should be affirmed

(a) because, says the Commonwealth, "the discrimination complained of by the appellant has been removed and the mandate of this court has been carried out." (Brief for Appellee, p. 2),

(b) because, says the Commonwealth, "The discrimination complained of has been removed by treating United States securities on a parity with Pennsylvania shares." (Brief for Appellee, p. 55).

These assertions of the Commonwealth are not sustained by the Record; they are not facts. The Record

discloses that the United States securities are not treated on a parity with the shares of stock deducted under authority of the language of the 1929 statute. The exempt and deducted shares of stock are, in the language of the statute, "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares,". Such class of exempt and deducted assets includes shares of stock of foreign corporations as well as of Pennsylvania corporations (See list of such shares in the instant case, R. 17), shares of stock of national banks (See R. 17, supra) and Federal Reserve Bank shares (See R. 125, par. (4); R. 126, par. a; See also Commonwealth v. Provident Trust Company, 40 Dauphin Co. Repts. 146; 41 Dauphin Co. Repts. 1; affmd. 319 Pa. 385 (1935).) (A certified copy of the complete opinion of the Dauphin County Court in the cited case of Commonwealth v. Provident Trust Company is among the records of this court, having been filed with permission of this court in the first appeal to No. 3, October Term, 1935. The state Supreme Court affirmed the judgment of the Dauphin County Court in the cited case upon the opinion of the Dauphin County Court. (See Supplemental Brief of Appellant filed in this court to No. 3, October Term, 1935.))

An examination of the method of settlement embodied in the judgment of the state Supreme Court (R. 154; See also R. 126) discloses that national bank shares and Federal Reserve Bank shares are deducted "flat", i. e. at 100 per centum of their actual value from the actual value of the net assets of the trust companies, in all cases and that a portion of the value of United States securities is deducted. (See Brief of Appellant, pp. 32, 33, 56 to 65 incl.) The Commonwealth ignores these facts.

The discrimination against the United States securities is evident. The tax settlement and calculation embodied in the judgment establish conclusively that the United States Bonds, Philippine Islands Bonds and Joint

Stock Land Bank Bonds are subjected to tax, are included in the tax base and that there is an increase of the tax burden by reason of their ownership. The shares of stock exempt by the language of the statute are exempted and deducted so as not to impose double taxation, not to tax them twice. If not to deduct such assets taxes them a second time, of a truth all assets not deducted are taxed. If, as both state courts held and ruled, national bank shares and Federal Reserve Bank shares must be deducted at their full actual value so as not to tax them, must not the full actual value of the United States bonds, the Philippine Islands bonds and the Joint Stock Land Bank bonds owned by the appellant be deducted so as not to tax them, must not the full value of all exempt and non-taxable assets be deducted so as not to tax them and not to discriminate against them?

If by the phrase, "Pennsylvania shares", the Commonwealth means shares of stock issued by Pennsylvania corporations, treating United States securities on a parity with such Pennsylvania shares under the "proportionate" method of settlement applied in the instant case does not remove the discrimination against such securities, does not relieve them from taxation, does not exclude them from the tax base. Such treatment of United States securities makes the non-taxability of the United States securities dependent in the case of each trust company upon the fact of ownership of Pennsylvania shares, the value of such shares and their proportionate relationship to the book value of so-called "permanent investments" less the full book value of national bank shares, Federal Reserve Bank shares and all other assets deducted at their full value. (See R. 105, 126, 154.) The deduction of the United States securities and the extent of the deduction are made to depend upon the kind and amount of the assets owned by each trust company. One trust company may receive in one year a deduction of the full value, another a deduction of 10 or 20 per centum of the full value

though the value of the United States securities and the net assets of each be the same. The succeeding year the same trust companies with the same value of United States securities may receive each an entirely different amount of deduction for the said United States securities, the amount being dependent upon the amount of its liabilities, deposits, the value of other deductible assets, whether or not they are "permanent investments" and whether or not the deduction be by the "flat" or "proportionate" method. United States securities are exempt under federal law and such exemption cannot be made dependent upon the application of a state statute.

It is evident upon a reading of the judgment entered in the instant case that United States securities are included in the denominator of the fraction (R. 102, 104, 153; Brief of Appellant, pp. 58, 59), are included in the tax base, that there is an increase of the tax liability by reason of the trust company's ownership of such United States securities and that but a portion of their value is deducted while 100 per centum of the value of national bank shares are deducted. That a deduction of any asset under the "proportionate" method of settlement does not lessen tax liability to the extent of a "flat", i. e. full-value deduction, is self-evident.

If, as the Commonwealth contends, parity of treatment removes discrimination, why were the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds not deducted on a parity with national bank shares and federal reserve bank shares which are included within the class of exempt shares of stock exempt under the language of the statute and deducted at their full value so as not to tax them? There is not a word in the Commonwealth's Brief in explanation of this manifest discrimination against and taxation of these non-taxable bonds.

At the oral argument reference was made to the statement that 19 per centum of the value of the exempt shares

of stock and United States securities exclusive of national bank shares were deducted and that therefore, argued the Commonwealth, there was an equality of deduction and a parity of treatment with consequent removal of discrimination. It so happens in the instant case that there was very little difference between the amount invested in the exempt shares and the amount invested in the exempt bonds. (R. 17.) The 19 per centum is approximately the amount of the proportionate deduction of these assets exclusive of the national bank shares, the amount deducted, $55,541., being approximately 19 per centum of the multiplicand of the calculation applied. (See R. 154; Brief of Appellant, p. 58.) That equality in the amount deducted other than a deduction of the full value and that parity of treatment by applying to two members of the class of exempt assets the "proportionate" method of settlement do not remove the discrimination and do not exclude the exempt bonds from the tax base is established by the judgments of the state courts by their deduction of the full value of two other members of the class of exempt assets, to wit, federal reserve bank shares and national bank shares and by the fact that the exempt bonds deducted under the "proportionate" method of settlement are included in the denominator of the fraction and the multiplicand in the calculation made in the application of the "proportionate" method of settlement. (See Brief of Appellant, pp. 58, 59.)

It is submitted that parity of treatment with assets deducted "proportionately" does not remove discrimination against and the taxation of the United States Bonds, Philippine Islands Bonds and Joint Stock Land Bank Bonds.

As stated in the Brief of Appellant filed with the court, if the tax imposed by the statute and applied by the tax settlement made against the appellant is a tax against shares qua shares, a personal levy against the shareholders,

a tax upon the property of the owner of the shares, the state is without constitutional authority to impose such tax upon the shares owned by non-residents of the state. The appellant referred to and called the attention of this court to the Brief of Appellant filed with this court in the appeal to No. 3, October Term, 1935. The state Supreme Court in its new opinion filed June 25, 1937 did not discuss this question but simply adhered to its conclusion set forth in the opinion of Mr. Justice Frazer filed June 30, 1934, (R. 73) (315 Pa. 429), and therefore the views of the state Supreme Court as expressed therein must be considered.

As stated in the Brief of Appellant filed in the first appeal, the state court in its determination of this question ignored the fact that prior to the passage of the Act of June 13, 1907, Pamphlet Laws, 640, trust companies were taxed upon their capital stock and that it so decided in the cases of Commonwealth v. Mortgage Trust Company, 227 Pa. 163 (1910) and Commonwealth v. Union Trust Co., 237 Pa. 353 (1912). The state court ignored the fact that the appellant was incorporated and that its Letters Patent were issued October 17, 1887, upwards of twenty years before the passage of the said act of 1907, supra. (R. 19) It is established as a fact that upwards of twenty years before the passage of the said act of 1907 this appellant was subjected to the capital stock tax and that under the law of Pennsylvania "shares of stock in a Pennsylvania corporation held by a corporation or individual domiciled in another state" could not "be taxed here". Com. v. Standard Oil Co., 101 Pa. 119, 148, 149 (1882).

It is submitted therefore that the distinction which is drawn by the statement of the state court that the case of Com. v. Standard Oil Co., supra, was a capital stock tax case and "does not impinge upon our decision here" is contrary to the law of Pennsylvania as theretofore declared by such court. So likewise, it is submitted, is the distinction attempted to be drawn with reference to its decision in the

case of Dupuy v. Johns, 261 Pa. 40 (1918) upon the grounds that it relates to the personal property tax levied under the Act of June 17, 1913, P. L. 507, and therefore is not in point here.

Shares of stock are personal property. The decision of the state court affirms such law. A share of stock is a share of stock whether it is subjected to tax under the Act of June 17, 1913, supra, or under the act of 1929 as held in the instant case and therefore the definition of a share of stock and the constitutional limitation upon the authority of the state to tax a share of stock declared by the state court in such decision is in point. Under the instant decision the tax is held by the state court to be a property tax, for the court has held it is a tax upon the shares in the hands of the shareholders though it determines the tax by applying a millage rate to the value of certain assets of the corporation, not to the value of the shares. It is submitted that there is nothing in the act of 1907, supra, and its amendments including that of 1929 in question in the instant case which changed either the nature of a share of stock or the constitutional limitation upon the power of a state to tax it.

The said Act of 1907 was a revenue statute imposing a property tax. It was not a statute regulating the issue of shares of stock by domestic trust companies or imposing a tax upon the issue of the stock of such corporations; it was not a statute imposing a stock transfer tax in exercise of the power of a state "to control and condition the operations of the corporation which it creates". The opinion of the state supreme court in the instant case declares that the said Act of 1907 as it was last amended by the said Act of April 25, 1929, Pamphlet Laws 673, imposed a tax upon the shares of stock issued by trust companies in the hands of the stockholders, imposed a tax upon the interest of the shareholders, thus interpreting and construing the statute as imposing a tax upon such intangible personal property of the stockholders. This being true, the question upon

this point of the appeal is whether or not a state has the power to impose a property tax consisting of a tax upon the interest of the stockholders in a corporation created by the state in the cases of stockholders who are non-residents of such state. The Supreme Court of Pennsylvania heretofore recognized the lack of such power in prior decisions which it has not overruled. (See Commonwealth v. Standard Oil Co., 101 Pa. 119, 148, 149 (1882)). As to the identity (for purposes of taxation) of the capital stock of a corporation and the shares of stock issued by it see Commonwealth v. Fall Brook Coal Co., 156 Pa. 488, 494 (1893); Commonwealth v. Penna. R. R. Co., 297 Pa. 308, 314 (1929). (See also Commonwealth v. Eastern Securities Co., 309 Pa. 44 (1932); Dupuy v. Johns, 261 Pa. 40 (1918); Callery's Appeal, 272 Pa. 255 (1922).)

It is submitted that the decisions of this court in the cases of Delaware, Lackawanna & Western R. R. Co. v. Commonwealth of Pennsylvania, 198 U. S. 341 (1905), Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) and First National Bank of Boston v. Maine, 284 U. S. 312 (1932) deny the authority of any state to impose a tax upon property which is located beyond its jurisdiction.

This court in the case of Corry v. Baltimore, infra, upon which the state court relies as establishing the authority of the state of Pennsylvania to impose a tax upon shares of stock held by non-residents of the Commonwealth, declared that a state had such power if the state in creating the corporation provided that such state should be the situs of the shares for taxation. There is no provision in the law of Pennsylvania in creating trust companies which made it a condition of the issuing of the shares of stock that the situs of such shares of stock for taxation purposes is this state irrespective of the owner's domicile. To make the cited decision applicable as the declaration of the authority of a state to tax shares of stock it must first be established that the corporation which issued the shares of stock was created with such condi-

tion attached to the issue of the shares of stock and that the law of the state made this state the situs for such taxation. The facts are to the contrary and it is submitted therefore that the citation of authority is not in point.

The state court said in its opinion in support of its conclusion that the tax imposed by the act of 1929 is a tax upon shares in the hands of residents and non-residents:

> "The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of residents or non-resident owners is clearly upheld in Corry v. Baltimore, 196 U. S. 466, where it is said, pages 476, 477: '* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation.'"

The quotation from the cited decision is incomplete. The omitted portion shows expressly that the portion quoted was the principle "concerning the taxation by the States of stock in national banks", the power of a State to tax such shares being given by the Congress of the United States. Immediately following the quotation contained in the opinion of the state court is the application of the principle (p. 477). This court said:

> "Applying this principle, it follows that a regulation of that character, prescribed by a State, *in creating a corporation* is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction." (Italics mine.)

The application of the principle is dependent upon the fact that the state prescribed a regulation "in creating a

corporation" that the situs of the shares of stock was the domicile of the corporation. Such is not the fact under the law of Pennsylvania. Such fact situation not existing, the cited principle has no application. This Court in the cited decision declared that the liability of a non-resident stockholder for a tax upon the shares of stock issued by a corporation exists only when under the law of the state there is a regulation fixing the domicile of the corporation as the situs of the shares for tax when the corporation was created, such regulation being expressed in the charter or being in existence in the general laws of the state "at the time the corporation was created" or at the time there was an "extension of the charter" of the corporation. None of these facts existed in the state of Pennsylvania at the time this corporation was created. It is beyond dispute that at the time the corporation was created trust companies were subjected to a capital stock tax. It is undisputed under the decisions hereinbefore cited in the cases of Com. v. Mortgage Trust Co., 227 Pa. 163 (1910) and Com. v. Trust Co., 237 Pa. 353 (1912) that the act of 1907 was a revenue statute imposing a property tax as was each one of its amendments. It was not a statute regulating the issue of the shares of stock and if it were it could have no application to the appellant-corporation which was created before its enactment. The state court held expressly in the cited case of Com. v. Mortgage Trust Co., 227 Pa. 163, that the act of 1907 was a revenue measure. In its opinion the state court outlined the history of the legislation, the taxation relating to trust companies and the policy of the Commonwealth in relation thereto. In the second opinion filed by the court in the cited case it was expressly held that "the Act of 1907 did not provide a new system of taxation, nor did it introduce new taxable subjects. It was a revenue statute . . ." (183). If, now, prior to the passage of the act of 1907 trust companies were taxed upon their capital stock and the act of 1907 did not provide a new system of taxation, did not introduce new taxable subjects and was

a revenue statute, how can it be said in reason and in justice that it was a regulation fixing this state as the situs for the taxation of shares of stock of domestic corporations irrespective of the place of residence of their owners? If, as is settled law, shares of stock issued by domestic corporations were not made subject to tax when owned by a non-resident of Pennsylvania, corporate or individual, prior to the act of 1907 and the act of 1907, as the state court held, did not introduce new taxable subjects, did not provide a new system of taxation, how can it be held that this revenue statute of 1907 and its amendment of 1929 regulated the issue of the shares of stock and made the shares of stock of domestic trust companies subject to tax when owned by non-residents?

It is submitted that the prerequisites to make the decision of this court in the cited case of Corry v. Baltimore, supra, pertinent to the instant case do not exist and that therefore such decision does not support the conclusion of the state court.

The conclusion of the state court is negatived by the later decisions of this court which it cites, namely, Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) and First National Bank of Boston v. Maine, 284 U. S. 312 (1932). The distinction made by the state court that these cited cases concern the imposition of "transfer inheritance tax upon choses in action at the death of the owner and can have no application here" is without foundation, for, as the cited cases show, whatsoever be the nature of the tax, whether a capital stock tax, a personal property tax or a transfer inheritance tax, the property must have a situs within the state which imposes the tax before such property can be taxed, directly or indirectly, before such property can be considered in the determining of the amount of the tax to be paid. In the first cited case it was expressly held (280 U. S. 212) that intangibles may be taxed at the domicile of their owner and that there is no reason for saying that they are not entitled to enjoy immunity from tax-

ation. The principle of mobilia sequuntur personam applies and therefore intangible personal property can be taxed only at the domicile of their owner, otherwise there is a violation of the due process of the law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States. This conclusion was reaffirmed and strengthened in the later case of First National Bank of Boston v. Maine, supra, wherein it was held that the ownership of shares of stock by the stockholder, which the state court says in the instant opinion is the subject of the tax under the Pennsylvania act of 1929, "is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts . . . And this interest is an incorporeal property right which attaches itself to the person of the owner in the state of his domicile." (329, 330)

It is respectfully submitted that the exclusive situs for the taxation of shares of stock is the domicile of their owner and that the taxation by the state of Pennsylvania of shares of stock owned by non-residents of the state is forbidden by the Fourteenth Amendment to the Constitution of the United States.

The Commonwealth's brief discloses that it holds to the conclusion that the statute as amended by the state Supreme Court imposes a tax upon the shares as shares though it argues that the amendment of the statute by the state court constitutes judicial legislation and is therefore void.

The amendment of the 1929 statute by judicial legislation allowing additional deductions emphasizes the fact that the tax is a tax upon assets of trust companies and not upon the shares issued by them, not upon the interest of the shareholders.

Under the statute as it was enacted by the legislature

the sole deductions allowed were "shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares". These deductions were allowed because under the law of Pennsylvania shares of stock issued by a corporation and the capital stock which gave value to the shares of stock were regarded as identical for taxation purposes and therefore the deduction of the shares of stock of corporations liable to pay a capital stock tax or tax on shares was allowed so as not to impose double taxation. The reduction of the shares of stock of corporations relieved from the payment of capital stock tax or tax on shares was allowed pursuant to the taxation policy of the Commonwealth whereby manufacturing corporations, laundering corporations and meat-packing corporations were relieved from the payment of capital stock tax or tax on the shares of such corporations. The deductions were allowed in order to exclude the assets thus deducted from the taxation which the legislature held resulted from the imposition of the tax under the statute without the deductions. It has been so declared by the state courts and by this court in the opinions filed in the instant case. (R. 56, 57, 58, 81.)

If the amendment of the 1929 statute by the state courts be valid then additional deductions are to be allowed and these additional deductions in the language of the state courts are deductions of all assets over which the state has no taxing jurisdiction. (R. 120.) The allowance of such additional deductions is a recognition of the fact that the tax is imposed upon the assets of the trust company and that a failure to deduct them, to remove them from the measure of the tax, taxes them and discriminates against them and in favor of the assets which are deducted. Howsoever the statute may have been viewed before its amendment by the state courts the allowance of additional deductions consisting of assets over which the state has no taxing jurisdiction, assets which are, as the state court puts it, "constitutionally exempted" (R. 119), assets which are

"exempt under the Constitution of the State or of the United States" (R. 120) conclusively establishes the fact that the statute does not impose a tax upon the shares issued by the trust company but upon the assets of the trust company which are not deducted.

The ground upon which deductions are allowed runs counter to any conception of a taxation of the shares issued by the trust company. The taxation of shares of stock is a taxation of the share-owners' property and has always been regarded as not being a tax upon the assets which give value to the shares. In the case of Dupuy v. Johns, 261 Pa. 40, 46 (1918), the state court said:

> "The tax on stock of a foreign corporation, eo nomine, in the hands of resident shareholders, is not a tax on the property represented by the capital of the corporation, but is a personal levy against the shareholder in question, based on the value of his stock, without any intent to reach the property that gives the latter its value (McKeen v. Northampton Co., 49 Pa. 519; Whitesell v. Northampton Co., 49 Pa. 526; see also note to Com. v. Westinghouse Airbrake Co., 151 Pa. 276, 281), and this is the sole ground upon which such tax is sustainable." (See R. 40.)

This definition of what constitutes a tax upon shares of stock and the distinction between the capital stock tax and the tax upon shares are recognized and expressly affirmed by the decision of the state court in the later case of Callery's Appeal, 272 Pa. 255 (1922).

The basis of the decision in the cited case of Dupuy v. Johns, 261 Pa. 40, (1918) is that a share of stock is property entirely separate and distinct from the corporate property, when taxed as a share it is indivisible and that unless it be such species of property the jurisdictional power of the Commonwealth to tax shares of stock owned by a resident of Pennsylvania when such shares of stock are issued by

foreign corporations which do no business in the state and have no property in the state does not exist. These decisions are not overruled by the state supreme court (R. 40, 73, 187.)

To constitute the taxation of shares of stock qua shares, the tax must be upon the share-owner's interest without diminution by reason or on account of the kind of property which constitutes the capital stock of the corporation which issued the shares. Shares of stock of equal value must be taxed equally; their taxation cannot vary by reason of the character of the assets which give them value. In the taxation of shares the tax liability cannot constitutionally be made to vary as the kind of assets of the corporation varies, while the interest of the shareowner remains the same and the value of the share is unchanged.

It is obvious that the moment consideration is given to the nature and character of the property which gives value to the shares of stock by way of eliminating from consideration certain assets of the corporation which give value to the shares, and giving consideration solely to other assets, that moment shares of stock are not taxed as shares of stock.

For generations the taxation of shares of stock in Pennsylvania, whether such taxation was by the Commonwealth as a state tax or by the counties as a local tax, and every decision upon the subject by the state supreme court were predicated upon the proposition that a share of stock is an indivisible entity, a species of property distinct from the assets which give value to it, owned by the shareholder and not the corporation which issued it, and that the tax was a personal levy upon the shareholder and therefore was imposed without any intent to reach assets owned by the corporations in any manner whatsoever.

In the case of Van Allen v. The Assessors, 70 U. S. 573 (1886) the taxation of the shares of national banks in the hands of stockholders, the capital of which banks was invested in stocks and bonds of the United States, was sus-

tained upon the ground that the entire share, the entire interest of the shareholder in the share was the subject of the tax (588). The court reaffirmed the principles which had been established by its decisions: "(1) that States cannot tax the agencies of the national government; (2) that States cannot tax the national securities in the hands of the individual citizens; (3) that States cannot tax the national securities in which may be invested the whole or a part of the capital of any association or corporation." (594)

In speaking of its decision in the Van Allen case, supra, this court said in the case of Cleveland Trust Co. v. Lander, 184 U. S. 111, 114 (1902):

> "The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and *shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank.*" (Italics mine.)

In the case of First National Bank of Louisville v. Kentucky, 9 Wallace, 353 (1870) it is said on page 360:

> "It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, *but the tax is the same in each case. This shows that it is the share which is intended to be taxed and not the cash or other actual capital of the bank.*" (Italics mine.)

Under the Act of 1929 the tax is not "the same in each case."

Under the Act of 1929 the kind of assets owned by the trust company determines not only the amount of the

tax to be paid but also whether or not any tax whatsoever is to be paid irrespective of the actual value of the shares of stock. *The factor which determines what tax, if any, is to be paid is the value of the assets of the trust company which the act says are exempt. Tax liability is determined by the kind of assets which the trust company owns, not by the interest of the shareholder.*

Is it not a fact that under the settlement made against the appellant the amount of tax required to be paid is greater by reason of the appellant's ownership of United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds than it would have been if the appellant had not owned them or if the amount invested in such bonds had been invested in federal reserve bank shares, does not such tax settlement infringe the immunity from taxation of such bonds and is not the settlement invalid under the decision of this court in the case of Missouri v. Gehner, 281 U. S. 313 (1930)?

The foregoing conclusion is not affected by the fact that the corporation may collect this tax from the shareholder. The method of collecting the tax does not determine the nature of the tax. The fact that the law requires the corporation to pay the tax evidences the relationship of the corporation to the tax. In the last analysis the effect of every corporate tax to be paid is to require the shareholder to make payment thereof, for there can be no issue of a lawful dividend to a shareholder unless there be a net income or profit to be distributed and there can be no profit or net income until current indebtedness is first paid or provision for its payment made. Com. v. Penna. R. R. Co., 297 Pa. 308.

We now find that every deduction which is required to be made under the statute as amended by the court is one which is required to be made when the tax is imposed upon the assets of the trust company. Before the enactment of the Act of June 13, 1907, P. L. 640, trust companies were taxed upon their capital stock, i. e. their assets

in the same manner as private business corporations (Commonwealth v. Mortgage Trust Company, 227 Pa. 163 (1910); Commonwealth v. Trust Company, 237 Pa. 353 (1912).) Under such tax the United States securities, Philippine Islands bonds and Joint Stock Land Bank bonds, national bank shares and federal reserve bank shares are all deducted at their full value. They are so deducted because the state has no jurisdiction to impose tax upon them, the capital stock tax being a tax upon the property of the corporation. (Commonwealth v. Standard Oil Co., 101 Pa. 119, (1882); Commonwealth v. Fall Brook Coal Co., 156 Pa. 488 (1893); Commonwealth v. Penna. R. R. Co., 297 Pa. 308, 314 (1929); Commonwealth v. Eastern Securities Co., 309 Pa. 44 (1932).)

There is now no distinction between the tax which was imposed upon trust companies before the enactment of the 1907 act and the tax imposed under this amended act of 1929. The deductible assets are the same in character. The tax imposed by this amended act is a tax upon shares in name only. It is submitted that if the 1929 act as amended be constitutionally valid, if such amendment of the statute be not judicial legislation, the tax imposed is not a tax upon the shares of stock issued by the trust company but is a tax upon the assets of the trust company and therefore, as in the case of other domestic private corporations made subject to the capital stock tax, United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds must be deducted at their full value as the state court under the amended statute has deducted at their full value national bank shares and federal reserve bank shares.

If the statute as amended by the state court be valid, the judgment of the state court is not valid for the hereinbefore recited reasons. If the statute as amended by the state court be valid, the proper method of taxation in order to construe the state statute in conformity with the acts of Congress and the Constitutions of Pennsylvania

and of the United States and thus carry out the intent of the state legislature as now declared is to determine the taxable value to which the rate of tax is to be applied by deducting from the total assets an amount of assets sufficient to cover liabilities, (R. 78. See also Commonwealth v. Trust Co., 237 Pa. 353, 356 (1912)) the full value of shares of stock of corporations exempted under the statute, including therein the full value of the national bank shares and federal reserve bank shares (R. 82) and the full value of the United States bonds, Philippine Islands bonds and Joint Stock Land Bank bonds. When such method is applied the amount of the tax is $570.43, which the appellant paid (See Brief of Appellant, pp. 13, 34, R. 59). Judgment therefore should be directed to be entered in favor of the appellant with costs.

II. Conclusion.

To add words of limitation to the 1929 statute (which the state court has done) and to strike from the 1907 statute its second proviso (which the Commonwealth argues this court should do), each is judicial legislation. The state court admits the unconstitutionality of the 1929 statute and avers that it allows the additional deductions for the purpose of removing its unconstitutionality (though in point of fact its method of tax settlement and consequent judgment do not do so).

That judicial process cannot make the 1929 statute constitutional without violating the mandate of the Supreme Court of the United States is evident. The validity of this conclusion the Commonwealth knows and admits and the General Assembly affirms by the Act of July 28, 1936, P. L. 73.

Legislation is the function of the law-making body created by the state constitution not that of the courts.

The new judgment of the state court entered under the alleged authority of the 1929 statute as the state court has amended it, violates the decision and mandate of this court.

The statute as amended by the court is unconstitutional and void upon the same grounds as is the statute as it was enacted by the legislature. There is a discrimination against and taxation of United States securities and the securities of federal agencies and instrumentalities, an inclusion of such non-taxable assets in the tax base and an increase of tax burden by reason of the trust company's ownership of such non-taxable assets.

It is submitted that the judgment of the state Supreme Court should be reversed with directions to enter judgment in favor of the appellant with costs.

JOHN ROBERT JONES,
Counsel for the Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

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In the Supreme Court of the United States

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SCHUYLKILL TRUST COMPANY, Appellant

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THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

Reference to the Official Reports of the Opinions Delivered by the Courts Below.

The opinions of the Court of Common Pleas of Dauphin County delivered by President Judge Hargest are reported in 42 Dauphin County Reports, 317; 43 Dauphin County Reports, 258 (R. 100).

The opinion of the Supreme Court of Pennsylvania, delivered by Mr. Justice Stern is reported in 327 Pa. 127, (R. 187).

SUMMARY

The Commonwealth contends and believes that it has conclusively established in the discussion in this brief that the Trust Company Act of June 13, 1907, P. L. 640, is a valid tax on shares and that the amendments to this act having been declared discriminatory, and by reason of such discrimination, unconstitutional, they are void and can have no effect upon the act of 1907.

The Schuylkill Trust Company is subject to tax for the year 1930 in pursuance to the provisions of said act, allowing no deductions whatsoever from its capital stock, surplus and undivided profits and that all of the shares of stock issued and outstanding, whether in the hands of residents or nonresidents, are subject to tax.

If this position of the Commonwealth is untenable, then the discrimination complained of by the appellant has been removed and the mandate of this court has been carried out.

ARGUMENT

I

Facts

This case is an appeal of the Schuylkill Trust Company from the judgment of the Supreme Court of Pennsylvania affirming a judgment of the Court of Common Pleas of Dauphin County in the matter of the tax on shares imposed on the Schuylkill Trust Company for the twelve months ending December 31, 1930.

The issues raised in this case involve the construction of the decision by the Supreme Court of the United States in the case of SCHUYLKILL TRUST COMPANY, APPELLANT *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113 (R. 76).

A tax on shares for the year 1930 was settled against the Schuylkill Trust Company by the fiscal officers of the Commonwealth and an appeal was taken to the Court of Common Pleas of Dauphin County to No. 61 Commonwealth Docket, 1933.

During the tax year in question, the Schuylkill Trust Company owned United States securities, Philippine Islands bonds, joint-stock land bank bonds, shares of national banks and shares of stock of Pennsylvania corporations paying a capital stock tax or tax on shares for which it claimed a deduction in arriving at the taxable value of its shares.

The Court of Common Pleas of Dauphin County in its decision at No. 61 Commonwealth Docket, 1933, allowed no deduction for the Federal securities owned and a proportionate deduction for shares of stock of Pennsylvania corporations paying a capital stock tax or tax on shares. This decision was affirmed by the Supreme Court of Pennsylvania.

On an appeal to the Supreme Court of the United States, this court upheld the Schuylkill Trust Company's contention that the failure to deduct the Federal securities and the allowance of the deduction of Pennsylvania shares was a discrimination against such securities and in its opinion held that the amendments of July 11, 1923, P. L. 1071, and May 7, 1927, P. L. 853, to the Act of June 13, 1907, P. L. 640, allowed a deduction for shares of stock of Pennsylvania corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares, were discriminatory, and reversed the decision of the Supreme Court of Pennsylvania and remitted the cause for further proceedings.

In an argument before the Court of Common Pleas of Dauphin County on remittitur from the Supreme Court of Pennsylvania to that court, the Schuylkill Trust Company contended that as a result of the decision of the Supreme Court of the United States, it was subject to no tax for the year 1930.

The Commonwealth contended, in construing the decision of the Supreme Court of the United States that these amendments having been claimed to be discrim-

inatory and therefore unconstitutional, the Schuylkill Trust Company was subject to tax for the year in question in pursuance to the Act of June 13, 1907, and that in ascertaining the value of its shares, no deductions should be made from the value of its shares.

The Court of Common Pleas of Dauphin County in an opinion rendered by William M. Hargest, P. J., decided that to remove the discrimination, a proportionate deduction should be made of Federal securities and its final judgment was entered in accordance with this opinion.

This judgment was affirmed by the Supreme Court of Pennsylvania (R. 187).

The Supreme Court of the United States, in upholding the contention of the Schuylkill Trust Company, as to the question of discrimination, said:

> **We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders.** The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned

upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities. (Boldface ours)

The mandate issued by the Supreme Court of the United States to the Supreme Court of Pennsylvania was "The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In view of this decision, the Commonwealth contends that the amendments of 1923, 1927 and 1929, having been declared discriminatory and therefore unconstitutional and void, these amendments are a nullity and of no effect, and we therefore must revert to the Act of June 13, 1907, P. L. 640 in assessing the tax on

the Schuylkill Trust Company. Of this act, this court said:

> **The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.** (Boldface ours)

II

Where an act purporting to amend and reenact an existing statute is void, the original statute remains in force; even though the amending act contains a repealing clause. The repealing clause itself falling with the void amending act.

This principle has been universally sustained by state supreme courts and the Supreme Court of the United States.

MAZUREK *v.* FARMERS' MUTUAL FIRE INSURANCE COMPANY OF JAMESTOWN, Appellant, 320 Pa. 33, at page 37 (1935):

> Where a subsequent statute which would, if valid, act as a repeal of a prior statute only by implication, i. e., because its terms are contradictory of the provisions of the earlier enactment, is itself unconstitutional, it must be obvious that the earlier act remains in full force and effect. This follows inevitably from the fact that in the eyes of the law it never came into existence. Never having come into existence, it could have no effect. The

rule that an unconstitutional enactment will not by mere implication repeal a preexistent valid law is well established: Frost *v.* Corporation Commission, 278 U. S. 515; The People *v.* Mensching, 187 N. Y. 8, and cases there cited. **Nor does the fact that the later invalid statute contains a clause repealing all prior inconsistent legislation work a change in the result:** State *v.* Blend, 121 Ind. 514; Sullivan *v.* Adams, 69 Mass. 476; Campau *v.* City of Detroit, 14 Mich. 276; City of Detroit *v.* Western Union Tel. Co., 130 Mich. 474; State *v.* Luscher, 157 Minn. 192; Devoy *v.* The Mayor, 36 N. Y. 449; Allen *v.* Raleigh, 181 N. C. 453. The only question is whether where, as here, an act expressly repeals another act and provides a substitute for the act repealed and the substitute is found unconstitutional, is the other act so expressly repealed to be judicially accepted as repealed. **Such a construction is not warranted unless it clearly appears that the legislature would have passed the repealing clauses even if it had not provided a substitute for the acts repealed.** Not only was there no such intention on the part of the legislature in the present case, but it is apparent that exactly the opposite was intended. The precise question now being discussed has not heretofore been passed upon by this court. However, other courts have enunciated the principle that a repealing clause expressly repealing a prior statute is itself ineffective where the substitute for the prior statute provided in the repealing statute is unconstitutional, and where it does not appear that the legislature would have enacted the repealing clause without providing a substitute for the act repealed: Rosenfield *v.* Drake, 112 Pa. Superior Ct. 1, 170 A. 414; People *v.* Fox, 294 Ill. 263; State *v.* Joyce, 307 Mo. 49; State *v.* Rice, 115 Md. 317; People *v.* De Blaay, 137 Mich. 402; Williams *v.* The State, 81 N. H. 341; State *v.* Edmondson, 89 Ohio State 351; State *v.* Groom, 91 Ohio State 1;

Portland *v.* Coffey, 61 Oregon 507. There is no doubt that the legislature in enacting section 344 of the Act of 1921 intended to preserve to courts of counties in which insured properties were located the jurisdiction in insurance cases created by the Act of 1857. It is a legitimate inference that the Act of 1857 would not have been repealed by the Act of 1921 if the legislature had known that section 344 of that act would be declared invalid for defect in the title of the act. (Boldface ours)

ROSENFIELD *v.* DRAKE et al., Appellants, 112 Superior Court, 1, at page 6 (1934):

* * * **"Unless it employs language showing an intent to repeal in any event and irrespective of its unconstitutional provision, an act which is invalid or unconstitutional and void or inoperative does not repeal another valid act."**

The whole statute, including the repealing section, is, in our judgment, void. The appellee comes, therefore, within the provision of the Act of 1919, supra, which remains unrepealed, fixing definite salaries for district attorneys in counties having a population of less than one million. We might add that the Act of June 9, 1931, P. L. 401, 412, §256, fixes definite salaries for district attorneys in counties of the third and fourth classes. Under the provisions of the former act, the salary of the district attorneys in counties whose population is more than forty and does not exceed fifty thousand (which applies to Bradford County) shall be $1,250—the amount fixed by the learned court below. (Boldface ours)

COMMONWEALTH *v.* MCDERMOTT, 10 D. & C. 618 at page 623 (1928):

> In the present case the act was aimed against those organizations, individuals and groups of individuals who do not come within the exemptions, and it is in the application of the act to them that the discrimination heretofore discussed results. **If this discrimination results in arbitrarily denying to one citizen or group of citizens rights which are given to another, the whole act is necessarily void.** (Boldface ours)

COMMONWEALTH ex rel. *v.* HUMPHREY et al. 288 Pa. 280 at page 289 (1927):

> * * * We cannot presume that the legislature would have passed the present act without the exemption contained in paragraph (g) of section 24, any more than we are warranted in thinking it would have passed the act even though all the numerous exemptions inserted had been omitted; hence, we must assume these exemptions to be inseparable expressions of the legislative will, and, as one, at least, of them is unconstitutional, the whole act falls.

BOOTH & FLINN *v.* MILLER, 237 Pa. 297 at page 309 (1912)

COMMONWEALTH *v.* ALDERMAN, 275 Pa. 483 at page 486 (1923)

This principle is very concisely stated by the Supreme Court of the United States in FROST *v.* CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, 278 U. S. 515 at page 525 (1929):

> **Here it is conceded that the statute before the amendment, was entirely valid. When passed, it**

expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent.

In passing upon a similar situation, the supreme court of Michigan, speaking through Judge Cooley, in Campau *v.* Detroit, 14 Mich. 276, 286, said: "But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void." In Carr *v.* State, 127 Ind. 204, 215, 11 L. R. A. 370, 22 Am. St. Rep. 624, 26 N. E. 778, the state supreme court disposed of the same point in these words: "We suppose it clear that no law can be changed or repealed by a subsequent act which is void because unconstitutional * * * An act which violates the Constitution has no power, and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." * * * (Boldface ours)

DAVIS *v.* WALLACE, 257 U. S. page 477 at page 483 (1922)

In TRUAX *v.* CORRIGAN, 257 U. S. 312, at page 341 (1921) the Arizona law was amended to take away certain equitable rights of injunction then existing. The Supreme Court of the United States having de-

cided that this amendment was invalid because it was a denial of the equal protection of the laws said:

> * * * Thus, Par. 1464 was an amendment to Par. 1456, and was included with the original section in the Code revision of 1913. To invalidate Par. 1456, we must assume that, had the legislature known that the clauses of Par. 1464, here involved, construed as the Arizona supreme court has construed them, were unconstitutional, it would have repealed all the existing law conferring the equitable power of injunction on its first-instance courts of general jurisdiction. We cannot make this assumption. The exception introduced by amendment to Par. 1456 proving invalid, the original law stands without the amendatory exception.

The Supreme Court of North Carolina in ALLEN *v.* CITY OF RALEIGH, 107 S. E. Rep. 463 at page 465 (1921) said:

> Where a repeal of a prior law is inserted in an act in order to secure the unobstructed operation of the act and the repealing law is itself held to be void, the provision for the repeal of the prior law will fall with it, and will not be operative in the repeal of the prior law unless the language of the repealing clause is such as to leave no doubt as to its intention to repeal the former law in any event. Where, however, it is not clear that the Legislature by a repealing clause attached to an unconstitutional act intended to repeal a former statute upon the same subject, except on the supposition that the new act would take the place of the former one, the repealing clause falls with the act of which it is a part.

In WILKINSON *v.* BOARD OF CHILDREN'S GUARDIANS OF MARION COUNTY, 62 N. E. 481 (1902) the court said:

> * * * if the amendatory act was unconstitutional, it was void, and had no effect on the original legislation.

In NORTON *v.* SHELBY COUNTY, 118 U. S. 425, at 442, the Supreme Court said:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

FARRINGTON *v.* MENSCHING, 79 N. E. 884, 187 N. Y. 8. LEWIS SUTHERLAND STATUTORY CONSTRUCTION, page 457, Sec. 245.

LEWIS SUTHERLAND, STATUTORY CONSTRUCTION, page 493, Sec. 256.

The Supreme Court of the United States, in the Schuylkill Trust Company case, having determined the amendments of 1923, 1927 and 1929 to the act of 1907 to be discriminatory and therefore unconstitutional, they are a nullity and certainly can have no effect on the prior valid act of 1907.

This principle was clearly pointed out by Mr. Justice Cardozo in the strong dissenting opinion in the Schuylkill Trust Company case, when he said:

> **The Acts of 1923, 1927 and 1929 prescribing the deductions, were amendatory statutes, separable, even though invalid, from the acts thereby**

> **amended. Eberle v. Michigan, 232 U. S. 700, 705; Davis v. Wallace, 257 U. S. 478, 484, 485; Truax v. Corrigan, 257 U. S. 312, 342.** (Boldface ours)

A valid act cannot be impaired or affected by an unconstitutional amendment. The amendment may be held invalid, but the act it amends, if free from constitutional objections, will stand as it did before the unconstitutional amendment. It cannot for a moment be entertained that an unconstitutional amendment to a valid act can destroy the validity of the act.

The amendatory act is void from its inception and may be entirely discarded as unaffecting the original act. To this effect, see GAY *v.* BRENT, 179 S. W. 1051, 1058, 166 Ky. 833.

The Act of 1907, P. L. 640, in addition to the amendments thereto, was squarely before the Supreme Court of the United States, for this court, in clear, unequivocal language, in discussing that act said:

> **The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.** * (Boldface ours)

The Act of June 13, 1907, P. L. 640 contained the following proviso:

> * * * And provided further, That in case any such company shall collect annually from the

*Van Allen *v.* Nolan, 3 Wall. 573; Cleveland Trust Company *v.* Lander, 184 U. S. 111; Des Moines National Bank *v.* Fairweather, 263 U. S. 103. (Cited by the Supreme Court of the United States)

shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth.

This proviso does not authorize the Auditor General to assess the tax. The main portion of the act imposes a duty upon the Auditor General to assess the shares for taxation. In no other section of the act is such a duty imposed upon the Auditor General. In imposing a tax upon the actual value of the shares, the Auditor General is to add the capital stock paid in, the surplus and undivided profits and dividing this by the number of shares to assess the tax.

The proviso is merely an inducement to the trust company in the form of a discount to pay the tax on or before a certain date. If the trust company elects to pay the tax in accordance with the proviso, the duty is upon the officers of the trust company to compute the tax against themselves in accordance with the provisions of the proviso and pay the same into the State Treasury.

This provision in the act of 1907 is not unlike the provisions in many taxing statutes of this Commonwealth which offer discounts to the taxable if the tax is paid at a certain time. If the proviso in this act did not have to do merely with a discount, why was it necessary to amend the act of 1907 so as to authorize the Auditor General to make the tax assessment against the shareholders according to the discount method as provided in the act of 1907? As further proof of the fact that the discount method of payment was not the method by which the Auditor General was to assess the tax under the act of 1907, we refer to the case of COMMONWEALTH *v.* MORTGAGE TRUST COMPANY, 227 Pa. 163 (1910) in which case, this in passing on the constitutionality of this act, directed its entire discussion to the fixing of the value of shares by adding the capital stock, surplus and undivided profits and making no mention of the discount method in the proviso.

The Supreme Court of the United States in the SCHUYLKILL TRUST COMPANY case had before it the entire act of 1907 and held that it did not discriminate against United States securities.

The court, in its opinion, said "On June 13, 1907, the General Assembly adopted an act prescribing another method of taxation in the case of trust companies. Its pertinent provisions are copied in the margin."

The provisions referred to in the margin deal with the assessment of the tax on the capital stock, surplus and undivided profits.

Even for the sake of argument, if the proviso likewise falls as being discriminatory, the main part of the act of 1907 stands intact because that proviso could be severed from the act of 1907 without harm to the act because it is not interwoven with the forepart of the act and the forepart of the act does not depend upon the proviso. Furthermore, it is the Commonwealth's position that the proviso of the act of 1907 is not applicable in the instant case, nor in the case of any trust company for the tax year 1930 because the Girard Trust Company did not pay its tax on shares in accordance with the proviso, i. e., on or before March first of the year in question.

An examination of the act of 1907 clearly shows that without the proviso, it is complete in its provisions and purpose and sufficient to carry out the intent of the legislature. The act, without the proviso, provides for the filing of reports, the assessment of the tax and the collection thereof. It provides for the filing of reports on or before the twentieth day of June, in each and every year with the Auditor General, and upon the assessment of said tax on reports filed, the company was required to pay said amount within forty days of said settlement. The proviso permitted title insurance or trust companies certain deductions if the tax were paid on or before the first day of March in each year. What else could have been the intention of the legislature in the proviso contained in the act of 1907 other than to offer to these banks these deductions as a discount if the tax were paid in March rather than in June of the tax year.

The Act of 1907, with section 710 and section 807 of The Fiscal Code (Act of April 9, 1929) now provides and in 1930 provided the necessary machinery for the assessment and collection of the tax on shares on title insurance and trust companies. There is no merit in appellant's argument or the position taken by the lower court that since the act of 1907 contained a proviso allowing the deductions held to be discriminatory in the amendments of 1923 and 1927, the act of 1907 is void. Nor is there merit in the argument in the lower court that the proviso carry out a legislative policy, that is to avoid double taxation, for if the policy of the legislature was to avoid double taxation, why was the tax not so imposed in the body of the act rather than by proviso so that all title insurance and trust companies might benefit by the legislative policy rather than those who assessed and paid the tax themselves on March first of each year. It was not until 1923 that the legislative policy to avoid double taxation was invoked and the discount method contained in the proviso of the act of 1907 was made the method of taxation in 1923. And it was not until 1927, to continue this legislative policy with respect to corporations relieved from the payment of capital stock tax that this additional exemption was allowed. It would seem that this would clearly indicate that the proviso was nothing more than an incentive in the form of a discount to these title insurance and trust companies to pay their tax in March rather than in June to enable the Commonwealth to have the benefit of this revenue at an earlier period. Corpus Juris 59, Statutes, Section 206.

b. *Determination of Severability of Statute:* Whether the valid and invalid parts of a statute

> are independent and separable, or interdependent, is a question of construction and of legislative intent, and in determining the question the rule is that if, when the invalid part is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained to that extent; and this rule is especially applicable where the statute provides for two distinct subjects. In this connection it has frequently been declared that the valid part of a statute will be sustained where the valid and invalid parts are so separate and distinct that it is clear or may be presumed that the legislature would have enacted the former without the latter, if it had known of the invalidity, or, as otherwise stated, if the valid or invalid parts are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other, the act will be upheld so far as valid. * * *

The act of 1907 is a revenue raising statute and its primary object is to raise revenue. The proviso contained in the act was merely an inducement to the banks to pay the tax themselves before a certain date. It seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect to the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the proviso shall fall for lack of validity.

In the case of COMMONWEALTH ex rel. *v.* HUMPHREY et al., supra, the court said:

> * * * This rule is expressed in Rothermel *v.* Meyerle, 136 Pa. 250, 265, as follows: "If the part which is unconstitutional in its operation is independent of, and readily separable from, that

> which is constitutional, so the latter may stand by itself, as the reasonable and proper expression of the legislative will, it may be sustained as such; * * *"

The unconstitutionality of one provision of a statute does not render it invalid as a whole, where such provision may be stricken out without altering the meaning, purpose, or effect of those remaining. See MACMILLIAN Co. *v.* JOHNSON, 269 F. 28.

Unconstitutionality of a part of a statute does not render the balance invalid, where enough remains to show the legislative intent and to furnish sufficient details. See STATE *v.* DUNCAN, 175 S. W. 940, 265 Mo. 26.

Where an unconstitutional provision of a statute stands by itself and is so separated from the rest of the statute in purpose and meaning that it may be eliminated without affecting the validity of the remainder, and it does not depend on the rest of the statute, and the rest of the statute does not depend on it, and they are not so related in substance and object that it is impossible to suppose that the legislature would have passed one without the other, the invalid provision of the statute may be eliminated. See PEOPLE *v.* PURDY, 89 N. E. 844, 196 N. Y. 550; PEOPLE *v.* PURDY, 89 N. E. 838, 196 N. Y. 270.

How can appellant complain that to tax it for the year 1930 allowing no deductions would result in a lack of uniformity since all other title insurance and trust companies taxes for the year 1930 were allowed the deductions. Certainly the Commonwealth in taxing these institutions could not do otherwise since it was following the statute with respect to them.

Appellant raised the questions with respect to these deductions and since these amendments have been declared unconstitutional, how can appellant with any justification now claim that it should be taxed like the other institutions.

All appeals to the Court of Common Pleas of Dauphin County from tax settlements are heard de novo in pursuance to Article IX, Section 1104 of The Fiscal Code (Act of April 9, 1929, P. L. 343). Certainly that court, in rendering its opinion and entering final judgment would be required to do so in accordance with the laws that were in existence and in effect during the tax year in question. This would be so, regardless of how such settlements were made by the fiscal officers of the Commonwealth. If the court's decision was not in accord with the practice of the fiscal officers, it certainly could not be said that the court offended the uniformity clause of the State Constitution. (Article IX, Section 1). If such would be the case, then the courts would be required to follow the policy adopted by the fiscal officers of the Commonwealth regardless of the fact that such fiscal officers followed an illegal policy. Yet the appellant argues that the Court of Common Pleas of Dauphin County cannot tax the appellant in a manner different than other title insurance and trust companies were taxed for the year in question by the fiscal officers of the Commonwealth. By the same token, it would argue that the decision of this court could not effect the appellant for the tax year in question. By inference therefore the appellant contends that a lack of uniformity would be created by the courts, which argument the Commonwealth contends is erroneous.

III

Where the language used in a statute is plain, the court cannot read words into it that are not found therein, either expressly or by fair implication, even to save its constitutionality, because this would be legislation and not construction.

The Commonwealth contends that since the amendments to the act of 1907 have already been declared to be discriminatory and in effect unconstitutional by the Supreme Court of the United States, that it was not within the province of the lower court to remove the discrimination by reading certain words into the acts that were not contained therein. Since the question of the constitutionality of these amendments have already been disposed of, the lower court could not, either expressly or by fair implication, give these amendments a constitutional construction.

The legislature, in 1907, by the Act of June 13, 1907, P. L. 640, specifically taxes trust companies in a certain manner. The measure or base of the tax included United States securities and those securities which were permitted to be deducted by the later amendments. This fact, the legislature knew when this statute was enacted, and it was recently declared to be a valid tax on shares by the decision in the SCHUYLKILL TRUST COMPANY case.

In 1923, the legislature, with this knowledge, specifically and deliberately permitted a deduction of shares of stock of Pennsylvania corporations which had paid a capital stock tax or tax on shares from this tax base.

This was done by the legislature with a specific reason in mind and that to avoid double taxation.

In 1927, the legislature, with the same knowledge, specifically and deliberately permitted an additional deduction by amendment of shares of stock that were relieved from the payment of capital stock tax or tax on shares, and this was done by the legislature with a specific reason in mind, and that, to relieve shares of stock of manufacturing corporations from tax, which manufacturing corporations were relieved, by an act, from the payment of a capital stock tax; and now the appellant would have this court, in effect, write into the amendment the words **"also United States securities"** to remove the discrimination and sustain the constitutionality of these amendments.

If the legislature intended a deduction for United States securities, it could very easily have said so.

The intention of the legislature must primarily be determined from the language employed, and the courts have no right to insert words or phrases so as to incorporate in a statute a new and distinct provision. The courts cannot, by construction, supply a *casus omissus* by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said and which, to all appearances was not in the minds of the legislature at the time of the enactment of the law. No mere omission, no mere failure to provide for contingencies which it may seem wise to have provided for, specifically justify any judicial addition to the language of the statute. It is not for the court to say where the language of the

statute is clear that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions.

The courts have frequently adverted to the fact that if the legislature had intended to accomplish a particular end, it would have been a very simple matter for it to have employed appropriate language to express its intention; "it would," it has sometimes been said "have been easy to say so."

Certainly, if the legislature intended to allow a deduction for United States securities in the taxation of trust companies, which deduction would in effect negative the tax on all trust companies in Pennsylvania, it would have deliberately and specifically provided for such a deduction, for to allow such a deduction would in effect leave the trust companies in such a position that they would be paying hardly any tax whatsoever. It is inconceivable that the legislature ever intended such a thing, especially in view of the fact that these United States securities formed a portion of the base upon which the tax on trust companies was assessed.

We reiterate again that to sustain the constitutionality of the amendments to the act of 1907 by enlarging the deductions so as to permit a deduction of United States securities, this court would be required to write into the act, the qualifying words which would be added to its provisions in order to save it in one aspect and thereby to destroy it in another.

In re LOWRY'S ESTATE, 314 Pa. 518 at page 519 (1934), it was said:

It is the Commonwealth's contention that the legislature by the Act of 1929 intended to make a decedent's interest in an account such as the one now before us, subject to a transfer tax. It may be that the legislature intended to do this but it did not choose apt words with which to effectuate its purpose.

* * * *

* * * The Commonwealth would have us interpret paragraph "e" of section 1 of the amendatory Act of 1929, as though the words "prima facie" in the phrase "shall be deemed, prima facie, a transfer of one-half or other proper fraction thereof" apply only to the words "one-half, or other proper fraction thereof" and not to the word "transfer." Nothing in the act's context or title justifies this interpretation.

* * * *

If our interpretation of paragraph "e" of section 1 of the Act of 1929 makes that paragraph inoperative by putting property held by entireties beyond the reach of the taxing power conferred by the Property Transfer Tax Act of 1919, as amended in 1929, the remedy is obvious. The legislative craftsmen of the United States government and of many states have found no difficulty in framing a law to enable their taxing authorities to include in the appraisal of a decedent's taxable estate the value of the interest in property the decedent held jointly with another, with the right of survivorship. * * *

In the above case, this court refused to make operative, a taxing statute by transposing words that were already in the statute. The appellant asks this court to make operative a statute by interpolating and in-

serting words which are not even in the statute, and this court in the case of CATLIN *v.* PICKETT & Co., Appellants et al., 262 Pa. 351 (1918), specifically refused to add or interpolate words in a statute where it would defeat the intent of the legislature. In construing the Workmen's Compensation Act of June 2, 1915, P. L. 736, Section 307, which provided

> Should any dependent of a deceased employee die, or should the widow or widower remarry, or should the widower become capable of self-support, the right of such dependent, or such widow or widower, to compensation under this section, shall cease. If the compensation payable under this section to any person shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased,

this court said:

> The contention of appellant is that the above quoted words "for any cause," are to be limited to the causes stated in the preceding sentences. We do not so construe them. **An additional word or words would have to be interpreted in order to reach that conclusion, and we are not at liberty to add them, unless it is clearly necessary so to do in order to effectuate the legislative intent.** No such necessity exists here. On the contrary we are convinced that the addition of limiting words would defeat that intent. * * * (Boldface ours)

To the same effect is the case of HOWARD *v.* ILLINOIS CENTRAL RAILROAD COMPANY, 207 U. S. 463 at page 501

(1907), in which the Supreme Court of the United States said:

> Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read, "any employee when engaged in interstate commerce," we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy.
>
> The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. **But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose.** * * * (Boldface ours)

See also TRADE-MARK CASES, 100 U. S. 82 at page 95 (1879)

ILLINOIS CENTRAL RAILROAD Co. *v.* MCKENDREE, 203 U. S. 514, at page 529 (1906)

BALLARD *v.* MISSISSIPPI COTTON OIL Co., 34 Southern Rep. 533 at page 554 (1903)

MELLEN LUMBER COMPANY *v.* INDUSTRIAL COMMISSION OF WISCONSIN, 142 N. W. Rep. 187 at page 189 (1913).

In the BALLARD *v.* MISSISSIPPI COTTON OIL COMPANY case, supra, the Supreme Court of Mississippi very tersely stated the test with respect to the severance of statutes saying:

> * * * The difficulty is in finding the true test as to when a statute may be severed. That test clearly is this: That whenever the court finds on the face of a statute a number of different provisions, some constitutional and some unconstitutional, there it may sever, if they be not interdependent, between these provisions, striking out the unconstitutional: and, let it be marked, that in every such case, there is something to sever between on the face of the statute. That is what is meant by the severance of a statute. But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the Legislature, in order, by such interpolation, to make the provision which the Legislature did put there constitutional, there is no case of severance, in any proper legal sense; nor is it, in any legal or logical sense, a proper limitation of the provisions which are in a statute by judicial construction. **Such action by a court is nothing less than judicial legislation pure and simple.** (Boldface ours)

The plain and obvious meaning of the language used in a statute is generally the safest guide to follow in construing it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. These amendments to the act of 1907 primarily say what deduction shall be allowed a trust company in arriving at the value of shares taxable in such trust company. We respect-

fully submit that we cannot see how the lower court was justified in adding thereto, the following words "less United States securities." This, in effect, is what the lower court did in adopting the construction for which the appellant contends. There is nothing doubtful, obscure or ambiguous about the language used. Such action by the lower court is nothing less than judicial legislation.

The lower court in its opinion lays great stress on the presumption that the legislature did not intend to violate the constitution and to support its contention, at great length, cites the actions of our State courts and the Supreme Court of the United States dealing with the construction of various taxing statutes.

The first are the acts imposing a capital stock tax on all of the capital stock of certain corporations. The courts, in the construction of these statutes, rightfully said that these acts must confine the imposition of the tax to so much of the capital stock of corporations as was represented by property and business of the corporation within the State. There is no analogy to be drawn from these cases to the instant case. The decisions in the capital stock tax cases were predicated upon the theory that the legislature, having no inherent power to tax property that was not within the confines of this State could only have intended to tax property within the confines of the State, whereas in the enactment of the act of 1907, the legislature was wholly within its power in passing the act to include all securities of a Pennsylvania trust company and no attempt was made to tax property without the jurisdiction of the Commonwealth. The act of 1907 was a valid exercise of legislative power in the first instance,

whereas in the capital stock tax cases, the original statutes were an exercise of power beyond the legislature.

The second are acts imposing a tax on corporate loans. These acts impose a tax on all money owing and on bonds of corporations and here again the courts have properly limited these acts to the taxation of only those bonds held by residents within this Commonwealth. These acts were also predicated upon the fundamental proposition of a lack of jurisdiction in the legislature, whereas in the enactment of the act of 1907, the legislature was wholly within its right in passing that act to include all securities in the possession of a Pennsylvania trust company.

The third are acts imposing a tax on tonnage carried by various types of transportation companies and here again the courts properly held that this act could apply only to tonnage carried intrastate. This act was predicated upon the fundamental principle that the legislature could not enact laws affecting interstate commerce.

The fourth are acts imposing a tax on gross receipts of various corporations. The courts properly held that the tax on gross receipts must be limited to receipts received in intrastate commerce. Again these laws were predicated upon the fundamental principle that the legislature could not enact laws in contravention of interstate commerce.

The fifth are acts imposing a tax on the collateral inheritance and was rightfully held to apply only in-

sofar as it imposed a tax on property within this State. The same applies with respect to the direct inheritance tax acts and also the mercantile license tax acts.

All of these cases referred to by the court were cases where, in the first instance, the legislature attempted to usurp a power which was not inherent in the legislature, and the decision of the courts in all of these cases were predicated upon the principle that the legislature of Pennsylvania had no jurisdiction in the first instance to levy a tax on property without the confines of the State or on property engaged in intrastate commerce and of course it could not be presumed that the legislature intended to impose taxes on such property.

In the instant case, we are not confronted by a lack of jurisdiction or power on the part of the legislature when it enacted the act of 1907, but on the contrary, we have a proper exercise of the legislative powers.

In the case of MILLER *v.* UNION BANK AND TRUST COMPANY, 59 Pac. (2d) 1024 (1936), the Supreme Court of California held:

> * * * when discrimination or unconstitutionality results from a statutory amendment, as is the case here, it is the amendment which is invalid and not the original portions of the statute. Frost *v.* Corporation Commission, 278 U. S. 515, 525, 526, 49 S. Ct. 235, 73 L. Ed. 483. * * *

In the case of FIDELITY AND GUARANTY FIRE CORPORATION *v.* THE STATE TAX COMMISSION OF MARYLAND, 193 Atl. 164, the Court of Appeals of Maryland

had before it the same question involved in the instant case.

Section 15, Article 81 of the Code, Act of 1929, provided for the imposition of a tax on shares of national banks and domestic corporations other than finance corporations in the State of Maryland. The act further provided that after the ascertainment of the value of the shares of stock said corporations could deduct therefrom (1) the assessed value of all real estate assessed to such corporations; (2) if such corporation is a fire insurance company or life insurance company, the value of any mortgages on any real estate in this state held by it; (3) the value of shares of stock in any national bank and (4) the fair value of property exempt under section 7 (28 of this article). In accordance with the above act, the Tax Commission of Maryland, after ascertaining the total value of the company's stock deducted the assessed value of the insurance company's Maryland real estate, the net assessed value of shares of stock in domestic corporations which are taxable to the holders thereof under the laws of the State of Maryland, shares of stock in national banks situated in the State of Maryland, and certain issues of Baltimore City debt called city stock. There was included in the assets of the company, United States securities which were not deducted from the taxable value of shares. The company contended, in view of the case of SCHUYLKILL TRUST COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA, supra, that the failure to deduct by the State Tax Commission from the assessment, the United States securities, resulted in a discrimination against such United

States securities. The tax commission contended that to remove the discrimination, if such existed, it should be removed by striking down the deductions which created the discrimination. The Court of Appeals of Maryland, after pointing out the similarity of the Pennsylvania and Maryland statute held:

> The effect, therefore, of this opinion is that, this assessment is invalid only in so far as it excluded the valuation of the stock of domestic corporations, the stock of which had been assessed to their shareholders, the city stock and the stock of a steamship company. If these had been included in the valuation of the stock of the appellant, the assessment complained of could not have been regarded as an unfriendly discrimination against the federal securities which had been assessed in this case, as we read the majority opinion in the case of Schuylkill Trust Co. *v.* Pennsylvania, 296 U. S. 113, 80 L. ed. 91 * * *

It is true that the Maryland statute contained a saving clause providing for the elimination of any exemptions in the event that they were declared invalid. This, however, for the reasons hereinbefore cited does not distinguish this case from the instant case. The Commonwealth contends that since the amendatory acts of 1923, 1927 and 1929 are invalid and inoperative, they can have no effect on the prior valid act of 1907.

The court, in the above case, adopted the proper method to remove the discrimination by eliminating the exemptions rather than by increasing them. The latter would be judicial legislation, pure and simple.

IV

The shares of stock owned by nonresidents are subject to tax on shares provided by the act of 1907.

This question was originally raised in the case of SCHUYLKILL TRUST COMPANY, Appellant, *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, and is renewed now by the appellant in the instant case. Because this matter was not directly passed upon by this court, the Commonwealth, in this brief, because of the importance of this question, renews its objections to the position of the appellant.

Although this objection was thus raised, it rather appeared in the court below to have been raised as a point of little consequence in view of the fact that only one sentence in the appellant's elaborate brief of argument in the court below made any reference thereto. Likewise, very little was said by the appellant at the oral argument on this point. In addition, to have this point so strenuously pressed now, in view of the fact that for all these years from 1907, no question of this character was raised by any of the learned counsel who represented the taxables involved, seems very unusual. At least, it leads to the conclusion that the contention now made that the language of the act of 1907 "clearly" did not apply to all of the shares of stock of trust companies both resident and nonresident owners, is without foundation, to characterize it mildly. Irrespective as to what the appellant may now contend on this point as to the act here in question, the fact remains that the taxing officers of

the Commonwealth—first the Auditor General and State Treasurer, and since The Fiscal Code, the Department of Revenue and the Department of the Auditor General, definitely interpreted the act of 1907, and its amendments as they have been made, as imposing a tax on all of the shares of the trust company in the hands of the shareholders whether they be resident or nonresident, and this interpretation was universally accepted up to the tax period here in question. For 23 years therefore, this interpretation has stood unchallenged. What has transpired to raise the question now? Did the decisions of the United States Supreme Court in FARMERS LOAN & TRUST CO *v.* MINNESOTA, 280 U. S. 204 (1929), and the other inheritance tax decisions which followed including FIRST NATIONAL BANK OF BOSTON *v.* MAINE, 284 U. S. 312 (1932) have anything to do with directing attention to the Pennsylvania trust company tax on shares? We doubt it because the imposition of transfer inheritance tax is fundamentally different than the imposition of a tax on shares of a bank or trust company in the hands of the shareholder. The Supreme Court said concerning this situation in FIRST NATIONAL BANK OF BOSTON *v.* MAINE, supra, (p. 329):

> * * * since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. * * *

The Supreme Court of Pennsylvania in its original opinion (R. 73) in deciding this question said:

> Lastly, appellant argues that even though the tax in question in this proceeding be a tax on shares rather than a tax on the assets of the trust company, there is no jurisdiction in the Commonwealth of Pennsylvania to levy a tax on 166 shares owned by nonresidents. The authorities relied upon by counsel for appellant do not sustain this proposition. Commonwealth *v.* Standard Oil Company, 101 Pa. 119 was a capital stock tax case and does not impinge upon our decision here. Dupuy *v.* Johns, 261 Pa. 40 relates to personal property tax levied under the Act of June 17, 1913, P. L. 507, and is likewise not in point. Nor is the tax here in question within the prohibition against double taxation enunciated by the decisions of the United States Supreme Court in Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, and First National Bank of Boston *v.* Maine, 284 U. S. 312, for those cases concern the imposition of transfer inheritance taxes upon choses in action at the death of the owner and can have no application here. [fol. 126] The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of resident or nonresident owners is clearly upheld in Corry *v.* Baltimore, 196 U. S. 466, where it is said, pages 476, 477: "* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation." We are of opinion the Act of 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673 establishes

the situs of the shares of appellant in Pennsylvania for the purpose of taxation within the meaning of the act.

In addition, there has been no amendment of the act of 1907, since its passage, which had to do with any change in the reporting of the shares or the assessment of the tax thereon, so far as this particular question is concerned, either directly or indirectly. It would appear that this present attack is only another example of the people becoming more tax conscious during a period of depression and using the proverbial magnifying glass to find flaws in the taxing statutes.

In view of the contention here made, the first question arises as to whether the legislature in the act of 1907, as amended, actually intended to tax all of the shares of stock of trust companies in the hands of the shareholders. As previously stated, the act has been interpreted by the taxing officers of Pennsylvania, ever since its enactment, to tax all shares owned by both residents and nonresidents. However, let us carefully examine the act itself with this point in mind.

The act of 1907, requires every title insurance or trust company incorporated in Pennsylvania under the provisions of the acts therein referred to, to report on or before a certain date to the Department of Revenue setting forth "**the full number of shares of the capital stock** subscribed for or issued by such company, etc." And thereupon it is provided that the Department of Revenue shall assess "**such shares** for taxation at the rate of five (5) mills upon each dollar

of the actual value of **each share of stock"** to be ascertained as therein provided. Near the end of section 1 it will be noted that it is provided: "That **upon the payment of the tax** fixed by this act into the State Treasury, through the Department of Revenue, the **shares** and so much of the capital, surplus, profits, and deposits of such company as shall not be invested in real estate **shall be exempt from all other taxation under the laws of this Commonwealth."** Thus it will be noted that the act of 1907, clearly and definitely imposes a tax on **all** of the shares of the stock of trust companies in the hands of the stockholders, whether they are resident or nonresident.

The act of 1907, as amended, also clearly and definitely provides for notice of the assessment of the tax on shares as settled by the taxing officers by requiring the same to be posted in a conspicuous place in the company's place of business. If the president, cashier, or treasurer of such company refuse to post the notice as required, such officer shall be adjudged to be in default and as a penalty therefor the company is made liable for the tax assessed against the stockholders.

The act further provides that it shall be the duty of the Auditor General (now the Secretary of Revenue) to hear any stockholder upon the subject of the valuation of any shares of stock at his office, within a period of thirty (30) days from the date of such settlement.

In view of the above provisions can it be seriously contended that the legislature of Pennsylvania did

not clearly and definitely intend to tax in Pennsylvania, the situs of the trust company where the investment was made, all of the shares of stock of the shareholders whether they be resident or nonresident? In addition to the clear statement all through section one of the act of 1907 that **all** of the shares are to be taxed, we wish to call particular attention to the proviso, previously referred to, near the end of section 1, which provides that upon the payment of the tax fixed by the act "the shares and so much of the capital, surplus, profits and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth" —meaning local taxation. What could be clearer than this to show that the Commonwealth was taxing **all of the shares?** If this were not so and only resident shares were taxed, there would be a proportionate liability for local taxation on that part of capital, surplus, profits and deposits represented by nonresident shares.

However, it is contended by appellant that this is contrary to the principle laid down by this court in COMMONWEALTH *v.* STANDARD OIL CO., 101 Pa. 119 (1882) "that the shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another state cannot be taxed here," and that this principle has not since been changed in Pennsylvania. But it is important to note that the court was there dealing with a capital stock tax case and not a tax on shares. When it came to enact the law providing for a tax on shares of a trust company in 1907, the legislature had before it a very different problem.

It was important for many reasons that all the shares be taxed and it so provided. As stated by Mr. Justice Elkin in COMMONWEALTH *v.* MORTGAGE TRUST Co., 227 Pa. 163 (1910) at page 180:

> * * * The legislature, in 1907, **made a new class of taxable subjects** and provided in express terms a definite method of determining the actual value of the shares of stock belonging to this taxable class. * * * (Boldface ours)

In view of this intent on the part of the legislature in the act of 1907 to tax **all of the shares** of stock in the hands of the shareholders, the question then arises, did the legislature have the power to impose such a tax applicable to nonresidents as well as residents? We submit that, as determined by the court below, this power is clearly established by the decision of the United States Supreme Court in CORRY *v.* CITY OF BALTIMORE, 196 U. S. 466 (1904).

However, it is contended by the appellant that the distinction in CORRY *v.* BALTIMORE is that the situs was created in the charter. The United States Supreme Court did not so state. True, it is that the statute which created the corporation fixed the situs of its stock for the purpose of taxation at the office of the corporation in Maryland. Although our Pennsylvania act does not definitely state in so many words that the situs for taxation of the shares shall be in Pennsylvania, it does definitely provide, as previously indicated, that **all of the shares of stock** of domestic title insurance and trust companies, **issued and outstanding,** shall be liable for this tax. The act could not be more specific in this respect. However, the decision

in the CORRY *v.* BALTIMORE case does not appear to have rested on the fact that the statute itself declared the situs for taxation of such stock, but more upon the notice to the nonresident stockholder of the assessment of the tax and the opportunity for contest by him as to the correctness of the valuation or validity of the tax itself. So far as these points are concerned, we submit that the act of 1907, together with the provisions of The Fiscal Code, provide more definitely for notice of the assessment and the right of hearing by the stockholders than does the Maryland act in the CORRY *v.* BALTIMORE case. In addition to the right of hearing afforded to the stockholder, the act of 1907 and its amendments also definitely provide for the hearing of the corporation as the agent of the stockholders on all questions pertaining to the assessment of the tax. The Supreme Court of the United States said in CORRY *v.* BALTIMORE, supra, at page 474:

> That it was rightly determined that it was within the power of the state to fix, for the purpose of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. * * *

In addition to CORRY *v.* BALTIMORE, supra, in further support of the power of the state to impose a tax on shares of trust companies in the hands of nonresident as well as resident shareholders, we cite the following decided cases: ABINGTON BANK *v.* WASHINGTON CO., 88 Va. 293; 13 S. E. 407 (1891); DANVILLE BANKING

COMPANY *v.* PARKS, 88 Ill. 170 (1878); SCANDINAVIAN-AMERICAN BANK *v.* PIERCE CO., 20 Wash. 155, 55 Pac. 40 (1898); STATE *v.* TRAVELERS INSURANCE CO., 70 Conn. 590, 40 Atl. 465 (1898); ST. ALBANS *v.* NATIONAL CAR CO., 57 Vt. 68 (1884); KOOCHICHING CO. *v.* MITCHELL, 173 N. W. (Iowa) 151 (1919).

In STATE *v.* TRAVELERS INS. CO., supra, a Connecticut statute, provided for a tax on shares and required the cashier of certain corporations to deliver to the controller a sworn list of all shareholders residing outside the state on a designated date and imposed the tax on such nonresidents, to be collected by the cashier of such corporations. It was contended that the statute attempted to tax property beyond the jurisdiction of the state. The court overruled this contention and said at page 603:

> There is nothing in the objection urged in the demurrer to the complaint, that the law in question "attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State." Each nonresident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a situs within its territory for purposes of taxation. Tappan *v.* Merchants' National Bank, 19 Wall. 490; Lockwood *v.* Weston, 61 Conn. 211, 218. To do this it is not necessary to declare in terms that they shall be deemed to be situated where the corporation belongs. It is enough to lay a tax upon them there, and impose a lien upon them there.

In ST. ALBANS *v.* NATIONAL CAR CO., supra, a Vermont statute provided for a tax on shares against certain corporations and that shares of stock in these corporations owned by residents of the state should be listed at the place of residence and those shares owned by nonresidents should be listed at the town where the corporation has its principal place of business, which corporation is the collector of the tax. This tax was upheld by the Vermont courts. The facts revealed that the car company was incorporated in 1868, and that the charter was granted subject to future legislation. The tax was passed in 1880. The court said, at page 81:

> * * * Admitting the general doctrine that in the absence of all provisions to the contrary, the stockholders in a corporation can be taxed upon their stock at the place where they reside, we think it is equally true that the nature of stock is such that it may be taxed elsewhere. If shares of stock represent nothing but that which is intangible, it could with better reason be claimed that it must always follow the domicile of the owner, and could not be taxed elsewhere; but it represents the property of the corporation, that in which the capital stock is invested. * * * Judge Cooley, in his valuable work on taxation, p. 274, in stating the general rule, that "the individual corporators, if taxed on their shares of stock, are to be taxed where they respectively reside," adds this important qualification, "though they may be and sometimes are, taxed at the place where the corporate business is carried on."
>
> But we think there is a still stronger reason why the taxation in question was valid. The corporate home of the company is in this State; the corporation is expressly subject to the exclusive

> legislative authority of the State; * * * its dwelling is here, although it may do business elsewhere; and its members, when they enter into the relation of stockholders, do so subject to such changes in the law relating to the corporation as the supreme legislative authority deems it proper to make. * * *

And with respect to the fact that the tax came after the charter it said:

> * * * It was conceded in argument that if the statute relating to the taxation of the shares had been inserted in the charter, that taxation under it would be legal. The charter would have been taken by the stockholders subject to such provision. But the stockholders took the charter subject to the right of the legislature to modify or repeal its provisions. Such modification may be made by general law, applicable to all similar corporations as well as by special amendments to each charter. Taking the charter subject to the power of future legislation, the stockholders took it subject to the law in contention as absolutely as if it had been included in the charter originally. The corporation also received its existence subject to modification by future legislation, though under the form of a general law. We see no valid reason why we should hold, without such a provision in the charter originally, that upon the acceptance of it, the stockholders or corporation should be exempt from the duties relating to taxation which are intended to apply to all alike. The taxation, therefore, in the manner shown, was legal.

So in the instant case, the appellant received its charter subject to the right of the Pennsylvania legislature to alter, amend, revoke or annul the same

(Pennsylvania Constitution, Article XVI, sec. 10); and it follows that if it is contended that the act of 1907 (and its amendments) is inconsistent in any way with the charter granted to appellant under the act of 1874, the act of 1907 must control and the corporation and its shareholders be bound by its provisions.

In addition to the above, from the standpoint of "business situs," which was referred to by the United States Supreme Court in FARMERS LOAN AND TRUST COMPANY *v.* MINNESOTA, supra, the situs for taxation of bank shares should be at the domicile of the bank for just as much reason as the situs of national bank shares for taxation is the situs of the bank as declared by Act of Congress because as said by the Supreme Court of the United States in TAPPAN *v.* MERCHANTS NATIONAL BANK, 19 Wall. 490 (1874) at page 503:

> A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems rea-

> sonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation.

And again at page 499:

> * * * Every owner takes the property subject, to this power of taxation under state authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. * * *

V

The discrimination features of the act of 1907 as amended have been removed.

The remaining portion of this brief is devoted to the argument that if the Commonwealth's original position to the effect that the Schuylkill Trust Company is liable to taxation in accordance with the act of 1907 without any deductions, cannot be sustained by this court, then the position of the appellant is unsound because the discrimination complained of has been removed by the decision of the Supreme Court of Pennsylvania in this case.

In the case of United States securities it has always been held that the securities themselves cannot be

taxed as property in the hands of the owner. Accordingly, when such securities are owned by a corporation, a capital stock tax, or other tax upon the property of the corporation, must exclude their entire value. But, it has held, just as consistently, that when a state imposes a tax upon the shares of stock of a corporation, as the property of the shareholders, there need be no deduction whatever made in the value of such shares by reason of the fact that the corporation itself owned securities of the United States and such ownership added value to the shares in the hands of the shareholders.

VAN ALLEN *v.* THE ASSESSORS, 3 Wall. 573,
CLEVELAND TRUST CO. *v.* LAUDER, 184 U. S. 111,
DES MOINES BANK *v.* FAIRWEATHER, 263 U. S. 103,
EDUCATIONAL FILMS *v.* WARD, 282 U. S. 379.

Since the tax here involved is a tax upon the interest of the shareholder in the trust company, the rule of the foregoing cases clearly applies, and, under it, there would be no necessity to make any deduction whatever by reason of the company's ownership of United States securities if it were not for the discrimination arising from the deduction allowed for shares of stock of other corporations.

We think it is clear that the ruling of the Supreme Court of the United States respecting this class of securities was not based upon the nature or the incidence of the tax, but solely upon the fact that there was an unfriendly discrimination against such securities and in favor of others. And from this it follows that if United States securities are placed upon an

exact parity with shares of stock of other corporations taxed or relieved of tax, the discrimination is removed and the tax so settled is valid. This is what the court below has done, and we believe that it was clearly right. There is no reason to place United States securities in a more favorable position than the shares of stock of other corporations.

This court, in the case of SCHUYLKILL TRUST COMPANY, Appellant, *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, in its opinion (R. 81) said:

> * * * If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities.

From this I believe we can safely assume that if a like burden of tax is lifted from United States securities as is lifted in respect of some securities, there can be no discrimination against United States securities since they are treated alike and to the same extent. Appellant complains that the use of the formula enunciated by the lower court does not remove the

discrimination on the theory that only a percentage of the total value of the United States securities are deducted. Certainly, the appellant should realize that the same percentage is deducted for Pennsylvania securities. The evident intent of the lower court was to treat the United States securities on a par with those securities of Pennsylvania corporations, the allowance of which as a deduction was held to discriminate against the United States securities. Certainly the percentage of all deductions will increase or decrease in taxing different banks depending upon the amount of United States securities or Pennsylvania shares that it might own, but the principle in all these cases remains the same, and that is that a deduction for United States securities will be allowed in the same proportion that a deduction is allowed for Pennsylvania securities. Appellant complains that flat deductions may be allowed to other banks where they prove the purchase of such securities to be out of capital stock, surplus and undivided profits. It is suffice to say in this connection that the same allowance is available to the appellant upon proof of such purchase.

The courts certainly hesitate to strike down a whole act as contended for by the appellant merely because there was an attempt to reach what was constitutionally exempted where the statute was capable of a constitutional interpretation.

As stated in ENDLICH on INTERPRETATION of STATUTES, Sec. 179:

> "It is a safe and wholesome rule to adopt the restricted construction of a statute, when a more

> liberal one will bring us in conflict with the fundamental law," indeed to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply.

When the language of a statute is so broad that its strict application will impose a tax upon property or value which cannot constitutionally be taxed, how is a violation of the constitution to be avoided. Shall it be done by declaring the entire statute invalid thereby defeating the express will of the legislature or shall it be by reading into the statute, an implied exclusion or deduction of such property or value in order that the statute may be sustained as so construed and applied?

If the Commonwealth's position that the act of 1907 applies in the instant case is untenable, then we submit that the latter answer is the correct one. We believe it the duty of the courts to sustain the acts unless it is clearly unconstitutional, and it is their further duty to construe it in such manner as to sustain its validity, if such construction can reasonably be found. In this connection, may we point out that in the Schuylkill Trust Company case originally before this court, the appellant did not attack the constitutionality of the statute itself, but contended that the statute as construed and applied was discriminatory. We respectfully refer to the minority opinion of Mr. Justice Cardozo in this case where he said "If the State maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions.

Iowa-Des Moines Bank *v.* Bennett, 284 U. S. 239, 247."

The lower court pursued this method and by so doing, sought to carry out what, in its opinion, was the intention of the legislature.

It is presumed that the legislature did not intend to violate the constitution and it therefore may be further presumed that it did not intend to include in the measure of the taxable value of the shares, the value of the United States securities which would thereby be discriminated against, but it maintained that its act should be so construed as to eliminate the value of such securities to the same extent that it allowed other securities to be eliminated in arriving at the value of the shares of trust companies.

The history of Pennsylvania is replete with cases wherein the legislature in the first instance imposed a tax on property owned by residents of Pennsylvania. These taxes were imposed on all the property of such residents, regardless where situated, and it was only through judicial construction that the intention of the legislature was deemed to impose a tax on such property only within the confines of this Commonwealth, for to do otherwise would be unconstitutional.

We shall attempt here to set out several of the instances wherein this principle of judicial construction was applied rather than a declaration of the courts that the act of the legislature was unconstitutional.

In the case of the STATE FREIGHT TAX, 15 Wall. 232 (1872), the Supreme Court of the United States held

that a tax levied by the State of Pennsylvania upon each ton of freight carried from the State to other states or foreign countries, and upon each ton brought into the State from outside was unconstitutional because it laid a burden upon interstate commerce and amounted to a regulation of such commerce. This court did not strike down the entire act as unconstitutional, but on the contrary, expressly stated that the tax was valid insofar as it applied to commerce within the State. The effect of the decision was to read into the act, an implied provision relieving the freight moving into interstate and foreign commerce.

In the case of PHILADELPHIA AND SOUTHERN STEAMSHIP Co. *v.* PENNSYLVANIA, 122 U. S. 326, this court held that a tax upon the gross receipts derived from passengers or property transported in interstate commerce was unconstitutional and in referring to the case of the State Freight Tax just cited, this court, at pages 339-340 said:

> The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the state and that which was destined to, or came from, another state. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other.

The act here was not stricken down, but was construed and applied by the taxing officers so as not to impose a tax on gross receipts derived from interstate commerce.

The direct inheritance tax act of June 20, 1919, P. L. 521 of this Commonwealth provided for a tax on the transfer of property of a resident of Pennsylvania, whether the property was situated within this Commonwealth or elsewhere.

In the case of FRICK *v.* PENNSYLVANIA, 268 U. S. 473, (1925), it was decided that upon the death of an individual resident of Pennsylvania, the tangible personal property of which he died seized located without the state, was not subject to the inheritance tax. The fact that the act is unconstitutional insofar as it applies to such property, or when it is administered, so as to impose a tax on such property, did not invalidate the remainder of the act, and inheritance taxes continued to be collected under it, there being after the decision in the Frick *v.* Pennsylvania case, supra, an implied provision that tangible personal property without the Commonwealth cannot be the subject of the tax.

In the case of CREW LEVICK COMPANY *v.* PENNSYLVANIA, 245 U. S. 292 (1917), it was decided that a mercantile license tax imposed on all retail dealers based upon each dollar of the whole volume gross of business transacted annually was unconstitutional insofar as such tax included sales made in interstate commerce. The result was not to strike down the entire mercantile tax law, but merely to exclude from the assessment so much of the sales as could not be taxed. And mercantile taxes have been collected under this statute ever since. The language of the act has not been changed. No express exclusion of sales in interstate commerce has been provided for. The taxing officers have merely read into the act, an implied exclu-

sion of such sales and have imposed tax on the remainder.

The lower court has adopted the same policy in the instant case and in its opinion (R. 119) says:

> We find no case in which the courts have struck down the statute in toto, merely because there was an attempt to reach what was constitutionally exempted where the statute was capable of a constitutional interpretation.
>
> Certainly the Legislatures of Pennsylvania, during the large part of a century had this principle in mind in passing these statutes with all-inclusive language, not intending that they should be enforced to violate the Constitution, but intending, as the courts had led the legislature to believe, that they could be constitutionally construed to include everything which the language could constitutionally embrace.

Therefore, if to allow any deduction for Pennsylvania shares results in a discrimination against United States securities, then a like deduction of such United States securities removes the discrimination. This having been done by the lower court and discrimination being the basis of claim by the appellant, the situation in our opinion has been rectified in regard to appellant's claim by this decision.

CONCLUSION

(a) The Commonwealth submits that the tax imposed by the Act of June 13, 1907, P. L. 640, is a valid tax on shares and remains unaffected by the amendments which were declared discriminatory;

(b) That the Schuylkill Trust Company is subject to tax for the year 1930 in accordance with the provisions of the act of 1907 allowing no deductions whatsoever from the capital stock, surplus and undivided profits in arriving at the value of the shares;

(c) That the tax imposed by this statute on the nonresident shareholders is a proper one.

(d) The discrimination complained of has been removed by treating United States securities on a parity with Pennsylvania shares.

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APPENDIX

Act approved June 13, 1907, P. L. 640:

Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances, and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled "An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth Anno Domini one thousand eight hundred and seventy-four and of the supplements thereto," approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, secretary, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of

five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. The Auditor General shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report as made by the officers of any such company, to summon the officers of said company to appear before him, upon notice to do so, on a day to be fixed by him, and to bring with them the books of said company for his examination; and he shall have the right to have further evidence to satisfy himself of the correctness of the report made to him on the question of the value of the shares of stock of such company, according to the rule hereinbefore stated. After the Auditor General shall have fixed the value of the shares of stock in any such company by the method hereinbefore provided, and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, secretary, or treasurer of any such company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such company's place of business, so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of the valuation of such shares of stock, at the Auditor General's office, within a period of thirty days from the date of said settlement. It shall be the duty of every such company, within a period of forty days after the date of such settlement by the Auditor General, at its option to pay the amount

of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and pay over to the State Treasurer: Provided, That if any such company shall fail or refuse to make such report, or to pay such tax, at the time hereinbefore specified, or shall make any false statement in such report, or shall fail or refuse by its officers to appear before the Auditor General upon notice, as aforesaid, or shall fail or refuse to produce its books for examination when required to do so by the Auditor General, he shall, after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain, add thereto fifty per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such company: Provided further, That if the president, cashier, or treasurer of any such company shall neglect or refuse to post a copy of the settlement, in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, cashier, or treasurer shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company: And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company,

and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company, as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth.

Act approved July 11, 1923, P. L. 1071, at page 1072.

The important part bearing on this case is as follows:

* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together **so much** of the amount of capital stock paid in, the surplus, and undivided profits as **is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares. * * *

Act approved May 7, 1927, P. L. 853.

This act further amended the act of 1907 which was last amended by the act of 1923 (page 855):

* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital

stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. * * *

Act approved April 25, 1929, P. L. 673; amended by Act approved June 13, 1907, P. L. 640; last amended by Act approved May 7, 1927, P. L. 853:

Section. 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled * * *; and thereupon it shall be the duty of the Department of Revenue to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares * * *: Provided * * * That upon the payment of the tax fixed by this act into the State Treasury, through the Department of Revenue, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth.

Section 807 of The Fiscal Code, approved April 9, 1929, P. L. 343:

Section 807. Special Procedure in Connection with Valuations of the Stock of Banks, Savings Institutions, Title Insurance and Trust Companies.—After the Department of Revenue shall

have fixed the value of the shares of stock in any bank, savings institution, title insurance company or trust company, and a settlement shall have been made as hereinbefore provided, the Department of Revenue shall transmit to the president, cashier, or treasurer of such bank, savings institution, title insurance company, or trust company, a copy of such settlement, showing the valuation and assessment so made by it and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, cashier, or treasurer, of any such bank, savings institution, title insurance company, or trust company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such bank, savings institution, title insurance company, or trust company so as to give notice to the shareholders of such valuation; and it shall be the duty of the Department of Revenue to hear any shareholder upon the subject of the valuation of such shares of stock, at the department's office within a period of thirty days from the date of said settlement. If any such hearing be held, notice thereof shall be given to the Department of the Auditor General, and that department shall be represented at such hearing.

It shall be the duty of every bank, savings institution, title insurance company, or trust company, within a period of sixty days after the date of such settlement by the Department of Revenue, at its option, to pay the amount of said tax from its general fund, or collect the same from its shareholders, and pay the same over to the State Treasurer through the Department of Revenue.

Section 1705 of the Fiscal Code approved April 9, 1929, P. L. 343.

Section 1705. Failure of Bank, Saving Institution, Title Insurance Company, or Trust Com-

pany to Make Report, Pay Tax, or Post Notice of Settlement.—If any bank, or savings institution, having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, or any title insurance company or trust company, as defined in section 712 of this act, shall fail or refuse to make the report required by section seven hundred eleven or section seven hundred twelve of this act, at the times therein specified, or shall make any false statement in such report, or shall fail or refuse, by its officers, to appear before the Department of Revenue, or shall fail or refuse to produce its books for examination when required to do so by the Department of Revenue, the department shall, after having ascertained the actual value of each share of the capital stock of such company from the best information it can obtain, add thereto ten per centum as a penalty, assess the tax, and proceed according to law to collect the same from such company; and, if the president, secretary, or treasurer of any such company shall neglect or refuse to post a copy of the settlement in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, secretary, or treasurer, shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company.

Article XVI, Section 10 of the Pennsylvania Constitution provides as follows:

> The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption

of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEE

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SCHUYLKILL TRUST COMPANY, Appellant

v.

THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEE

ARGUMENT

At the time of the oral argument in this court, permission was granted to the appellee to file a supplemental brief regarding the question raised as to whether the tax act in question is a tax on shares. This question was not dealt with in the original brief for the reason that it was always the Commonwealth's contention that the act in question imposed a tax on shares. In the case of SCHUYLKILL TRUST COMPANY, Appellant *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, this question was dealt with at great length by the Commonwealth.

This court, in deciding that the amendments to the act of 1907, as construed and applied were discriminatory, did not directly pass upon the question as to whether the act of 1907 as amended was a tax on shares or a tax on the assets of the trust company, this court saying: "We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax" (R. 80).

In this brief, the Commonwealth will support its contention that the tax in question is a tax on shares, and that the discrimination complained of has been eliminated by the Supreme Court of Pennsylvania.

The opinion of the Supreme Court of Pennsylvania in the case of SCHUYLKILL TRUST COMPANY, Appellant *v.* COMMONWEALTH OF PENNSYLVANIA, in the first case, said, regarding the nature of the tax, "There was no infringement of the immunity from taxation of government securities for the reason that the tax here in question was levied upon the shares qua shares and not upon the assets of the corporation." (R 74).

May we again herein contend that the discrimination complained of by the Schuylkill Trust Company, has been removed; that the United States bonds, Philippine Islands bonds and Federal land bank bonds of the appellant have been treated exactly the same as the Pennsylvania shares; that the judgment of the Supreme Court of Pennsylvania, in applying and construing the act of 1907 as amended by allowing the deduction of United States securities to the same extent as shares of Pennsylvania corporations, has removed the discrimination against such

United States securities and complied with the mandate of this court.

As indicated by the record on page 15, the original settlement did not allow any deduction for United States securities. The assets for which a proportionate deduction was allowed are indicated on page 18 of the record. The latest judgment of the Supreme Court of Pennsylvania, which affirmed the judgment of the Court of Common Pleas of Dauphin County allowed a full deduction for national bank shares on the theory of the case of BANK OF CALIFORNIA NATIONAL ASSOCIATION *v.* RICHARDSON, 248 U. S. 476, and a proportionate deduction for United States securities equal to that of Pennsylvania shares as indicated on page 154 of the record, thereby treating United States securities the same as Pennsylvania shares, eliminating the discrimination complained of.

I. Tax in Question is a Tax on Shares.

The tax involved in this case is a tax imposed by the Act of June 13, 1907, P. L. 640, as last amended by the Act of April 25, 1929, P. L. 673 (72 PS Secs. 1991, 2001, 2002, 2011). In order to fully present the nature of this tax, it is important to present briefly the history of the taxation of banks in Pennsylvania, a tax which has a very close relationship to the tax on the shares of trust companies, and then to present briefly the history of the legislation with respect to the taxation of trust companies.

(a) History of Taxation of Shares of Bank Stock.

The Act of June 11, 1840, P. L. 612, Sec. 1, a general revenue act, was the first act in Pennsylvania taxing bank

stock. The tax imposed was on the capital stock of banks. The tax was payable by the bank's officers, out of dividends declared. This was repealed by Act of 1868, P. L. 108, below.

The Act of April 29, 1844, P. L. 486, Secs. 32 and 33, followed this. It specifically provided that the tax, also on the capital stock, was payable out of the funds of the company. If no such funds were available, then it became the stockholders' duty to pay. It was repealed by Act of 1868, P. L. 108, below.

The Act of April 16, 1850, P. L. 477, Sec. 46, replaced the Act of April 29, 1844, and imposed a tax on the bank's capital stock.

The Act of April 27, 1852, P. L. 443, provided that the act of 1844 be applicable to all banks, with respect to the tax on capital stock.

The Act of April 12, 1859, P. L. 529, referred to Sec. 33 of the act of 1844, above, and provided that the capital stock be taxed only if there were no dividends, which were primarily taxed. It was repealed by Act of 1868, P. L. 108, below.

The Act of February 23, 1866, P. L. 82, was the first act taxing national bank stock. It made it the duty of the cashier of every bank, state or national, to collect a tax from every shareholder, whereupon the capital stock was exempted from further taxation. This act was construed as doing away with the taxing of the capital stock of banks: COMMONWEALTH *v.* N. Y., P. & O. R. R., 188

Pa. 169. It was held unconstitutional because conflicting with the Act of Congress on taxation of shares of stock of national banks.

The Act of April 12, 1867, P. L. 74 (72 PS Secs. 1911, 1933, 1934), taxed all shares of national bank stock in the hands of the holders of such shares.

Then followed the Act of April 2, 1868, P. L. 55 (72 PS Secs. 1935, 1937, 1971), which supplemented the act of 1867, with respect to appraisement of the stock, assessors, etc. It provided in section 49 (72 PS Sec. 1971), that taxes assessed thereunder should be a lien on the shares, and, in case of nonpayment, the shares of defaulting stockholders were made subject to attachment, levy, and sale. This act is still in force.

The Act of May 1, 1868, P. L. 108, was for the purpose of revising, amending, and consolidating the laws taxing corporations, bankers and brokers. It repealed the acts of 1840, 1844, and 1859, supra. By section 10 (72 PS Sec. 1912), it imposed a tax on shares of banks and savings institutions. It is still in force.

The Act of December 22, 1869, P. L. (1870) 1373 (72 PS, Sec. 1981), extended application of the act of 1867 and its supplement, the act of 1868, supra, to banks incorporated in Pennsylvania, and provided that those banks be subject to the same tax as national banks under the acts of April 12, 1867, and April 2, 1868. It is still in force, except its third section.

The Act of March 31, 1870, P. L. 42 (72 PS Sec. 1962), which contained a similar provision that if the bank elect to collect annually from its shareholders 1% of the par value of all shares, the three mill tax on the stock need not be paid. This act is still in force. (Also 72 PS Sec. 4764.)

The Act of June 7, 1879, P. L. 112, was a general revenue act, providing for various taxes. By section 17 it provided, apparently separately, for a tax on shares of bank stock, state and national. It was repealed by the Act of June 30, 1885, below.

The Act of June 10, 1881, P. L. 99, also provided for a tax on shares of bank stock, and by section 3, it exempted the capital of banks from further taxation, if they collected the tax from their shareholders.

The Act of June 30, 1885, P. L. 193 (72 PS Sec. 1913), entitled "A further supplement" to the act of June 7, 1879, supra, impliedly repealed this and the act of 1881, and taxed all stock "* * * and all other moneyed capital in the hands of individual citizens of the State, * * *" and restricted the taxation to that for State purposes. It rephrased the exemption provision, providing that "* * * the shares and so much of the capital and profits of such bank, * * *" should be exempt from all other taxation if the bank collected from the stockholders. Upon failure to pay, the Auditor General could settle accounts against the shareholders (Sec. 5).

Following this came the Act of June 1, 1889, P. L. 420, a supplement to the general revenue act of June 7, 1879, supra, taxing capital stock of corporations except

banks, etc. It gave them exemption from local taxation upon collecting the tax from their shareholders (sec. 25), failing which, and failing payment by the banks, accounts could be settled against the shareholders.

The Act of June 8, 1891, P. L. 229, also entitled as a supplement to the act of June 7, 1879, amended the act of 1889, and substantially reenacted the former amendment, and provided for exemption of state and national bank shares and capital from local taxation upon collection of the tax from their shareholders.

The Act of July 15, 1897, P. L. 292, was the last general act on the taxation of shares of bank stock. As first amended by the Act of May 2, 1925, P. L. 497, and again amended by the Act of April 25, 1929, P. L. 677, it provides (72 PS Secs. 1931, 1932, 1951 and 1961) for assessment of the shares for taxation; for the collection of the tax from the shareholders, or, at its option for payment by the bank, and in the former case for the exemption from local taxation.

(b) History of Taxation of Shares of Stock of Trust Companies

We have presented the history of the taxation of the shares of stock of banks of Pennsylvania not only because of the analogy to be drawn from some of these acts, but also because some of the acts of assembly previously referred to which are still in force, apply also to trust companies.

The acts of June 11, 1840 and April 29, 1844, aforementioned, were not restricted to "banks"; therefore trust companies were covered by their provisions. The acts subsequent to these, which we have referred to, were restricted to "banks and savings institutions." The change made by the act of February 23, 1866, supra, with respect to banks, did not apply to trust companies. Trust companies were left subject to a capital stock tax. This situation continued until the act of June 30, 1885, a supplement to the act of 1879, as previously referred to. This act (sec. 2) was extended to "all shares of stock in any bank, banking or saving institution or company, safe deposit, guarantee, surety and real estate, title insurance or trust company * * *". Trust companies could thereafter elect to collect the tax from their shareholders, and by so doing became exempt from all other taxation, which meant capital stock tax.

Under the act of June 1, 1889, supra, trust companies were again left to pay a capital stock tax, because that act restricted the election above referred to, to banks and savings institutions. The act reverted to the original status of taxation of trust companies. Likewise, the acts of June 8, 1891 and July 15, 1897, supra, were restricted to banks.

The Act of June 13, 1907, P. L. 640, expressly provided for the taxation of the shares of stock of "title insurance or trust companies." This act (with its amendments) is the important act for consideration in this case. After providing that every title insurance, or trust, company, incorporated under a certain Pennsylvania act, shall each year on or before the 20th day of June, make a report to the Auditor General, "setting forth the full num-

ber of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided," it imposed the duty on the Auditor General:-

> * * * **to assess such shares** for taxation at the rate of five mills, upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares * * *. (Boldface ours)

The Auditor General is given the right, if he is not satisfied of the correctness of the report made to him "on the question of the value of the shares of stock of such company," to examine into the evidence presented. It is further provided that after the Auditor General shall have fixed **"the value of the shares of stock of any such company"** as provided, and has settled an account according to law, he shall transmit to the president, cashier or treasurer of such company, a copy of such settlement of the tax due the Commonwealth **"on all such shares".** Thereupon, it becomes the duty of the president, secretary or treasurer to post the same in a conspicuous place in such company's place of business **"so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of valuation of such shares of stock,** at the Auditor General's office, within a period of thirty days from the date of such settlement."

It is the duty of the company, within forty days after the settlement, "at its option," to pay said tax "from its general fund, or collect the same from its shareholders and

pay over to the State Treasurer." If the company fails or refuses to make such report, or to pay such tax, the Auditor General is required "after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain," to add fifty per centum as a penalty to the tax and collect it from the company. Further, if the president, cashier or treasurer of the company neglects or refuses to post the required notice, such officer is to be adjudged to be in default and as a penalty therefor, "such company shall be responsible to the Commonwealth for the amount of the tax assessed against the stockholders of such company."

It further provided an optional or alternative method of ascertaining and fixing the value of the shares for the purposes of this tax, in the event the company collected and paid the same on or before March 1st in each year, as follows:

> * * * In case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together **so much** of the capital stock paid in, the surplus, and undivided profits **as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation

under the laws of this Commonwealth. (Boldface ours)

Although the act of 1907 speaks in the title and in the body of the act of the tax imposed as a tax on shares, it is admitted that this fact alone does not determine the nature of the tax. However, from the brief details of the act just given, it will readily be seen that at each step in the reporting, ascertaining, fixing and collecting of the tax, we are dealing with a tax on shares.

In COMMONWEALTH v. MORTGAGE TRUST CO., 227 Pa. 163 (1910), the Supreme Court said at page 175:

> * * * The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed. They made their reports to the auditor general under the general revenue acts of 1879, 1889 and 1891, and other statutes, just as other private corporations did, and the valuation of their capital stock was ascertained and the tax settlement made upon the same basis. This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company business grew in magnitude, as it did grow after the passage of the act of 1895 which conferred quasi banking privileges, the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks. * * *

The act of 1907 was first amended by the Act of July 11, 1923, P. L. 1071. This act, among other things, changed the time of the filing of the report, and the date for the ascertainment of the value of the shares was made "as of December 31 preceding." Relative to ascertaining and fixing the tax it provided that the duty of the Auditor General should be

> * * * to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together *so much of* the amount of capital stock paid in, the purplus, and undivided profits *as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,* and dividing this amount by the number of shares. * * * (Italics ours)

The italics are amendments of the act of 1907 made by the act of 1923. The other amendments were minor and have no bearing on the questions involved.

The act of 1907 was again amended by the Act of May 7, 1927, P. L. 853. This act amended the provision above quoted in the act of 1923 by adding the words "or relieved from the payment of capital stock tax" following the words "liable to pay to the Commonwealth a capital stock tax."

The act of 1907 was also specially amended by the act of April 25, 1929, P. L. 673, by changing the time for the filing of the reports and by substituting "Department of Revenue" wherever "Auditor General" had appeared in the old act of 1907 as amended. An amendment was

also made by striking out the provision requiring the Auditor General (now Secretary of Revenue), after making his settlement, to transmit to the president, secretary, or treasurer of such company, a copy of such settlement showing the valuation and assessment so made and the amount of the tax due the Commonwealth, and thereupon making it the duty of said president, secretary, or treasurer to immediately post the same in a conspicuous place in such company's place of business so as to give notice to the shareholders of such valuation, and requiring the Auditor General (now Secretary of Revenue) to hear any shareholders on the subject of the valuation of such shares during a period of thirty (30) days from date of settlement. These provisions were stricken out because they were incorporated in Section 807 of The Fiscal Code of April 9, 1929, P. L. 343. The act of April 25, 1929 amended the act of 1907 by striking therefrom the proviso which had to do with the failure or refusal of the trust company to make the report required, and also the proviso which had to do with the requirement placed upon the president, secretary, or treasurer of the company to post the notice of the settlement as aforementioned. These two latter provisos were also stricken out because they were incorporated in section 1705 of The Fiscal Code of 1929.

Thus the act of 1907 and its amendments fully provided for an assessment of a tax against the shares and the payment of the tax by the company from its general fund or collection by it from its stockholders,—as in the case of the tax on shares of bank stock. Accordingly, while from 1889 to 1907 banks and trust companies diverged with respect to stock taxes, the act of 1907 and

its amendments have substantially brought them together again.

The history of much of this legislation was also traced by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, 227 Pa. 163 (1910).

(c) Act of 1907, as amended, Provides for a Tax on the Shareholders, Not on the Capital Stock or Property of the Trust Company. It Charges the Company as Collector Only

Although the tax on bank stock started out as a capital stock tax, since the act of February 23, 1866, previously referred to, the tax has consistently been assessable on the shares of stock in the hands of the stockholder. The act of 1891 provided an alternative method whereby any bank or savings institution incorporated by this State or by the Federal Government, could collect from the shareholders and pay into the State Treasury a tax of eight mills on the par value of its shares in lieu of all taxation except upon its real estate; upon failure so to elect to pay a tax upon the par value of the shares, it was made subject to a tax of four mills on the actual value of its shares of capital stock, without any exemption. As pointed out by Mr. Justice Elkin in COMMONWEALTH v. MORTGAGE TRUST COMPANY, supra, notwithstanding the inequalities that appear in this, the United States Supreme Court held this tax to be constitutional as a tax on shares in MERCHANTS' & MANUFACTURERS' NATIONAL BANK OF PITTSBURGH v. PENNSYLVANIA, 167 U. S. 461 (1896), affirming 168 Pa. 309. The following language of the United States Supreme Court in that case, at page 465, is pertinent:

> It is further insisted that the act is really one taxing the bank, and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of section 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the 8 mills shall make a report to the auditor general "setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation," * * *

Likewise, with respect to trust companies, between 1885 and 1889, and from 1907 to the present time, the tax has been assessable on the shares of stock in the hands of the stockholders. None of the acts, since the tax was assessed on the shares, contained any provisions for collection, upon failure to pay, out of the general funds of the bank or trust company. On any such failure the State officials are to settle accounts with the shareholders.

The only legislative provisions for such taxes to become liens, upon nonpayment, were contained in the act of 1844, supra, which provided for subjection of the property of the corporation to levy; but this is of no importance, because the tax was then still a capital stock tax. The act of 1868, supra, which is still in force, provides that the tax shall become a lien on the shares (72 PS Sec. 1971).

The act of 1897, supra, did impose on the bank a penalty of ten percent of the tax for failure to make a return.

But, as Mr. John G. Johnson pointed out in his argument in PENNA. CO. ETC. V. COMMONWEALTH, 22 W. N. C. 340 (1888), that must have been a mistake of the draftsman of the act, because in fact the act imposed no tax on the bank. He also pointed out another error in drafting the act; the date of return of names of the individual stockholders was made to precede the date of election of the bank to pay the tax or collect from its stockholders. In support of his contention that these were errors, he pointed out that both were speedily corrected by the act of 1881. Thereafter, no penalties were imposed on the banks for the obvious reason, as indicated by Mr. Johnson, that the tax was not imposed on the bank itself but on the shares of stock in the hands of the holders.

The tax in question here is a tax assessed against the property of the individual and not against the corporation or property of the corporation. This has been decided in connection with attempts of trust companies to deduct the amount of the tax from their assets in ascertaining their net taxable income under Federal taxation laws: NORTHERN TRUST CO. V. MCCOACH, 215. Fed. 991 (1914).

The court in that case in discussing the Trust Company Act of 1907 saying that the tax imposed by the State of Pennsylvania, by the act of assembly referred to is a tax imposed upon the property of the individual stockholders and not upon the corporation or its property and because of this, the amount of payment is not to be deducted from the gross income of the corporation in determining the taxable net income.

In HOME SAVINGS BANK v. DES MOINES, 205 U. S. 503 (1907), the United States Supreme Court in discussing a tax upon the owners of the shares of stock in a corporation, said (p. 518):

> * * * The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, **either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him.** First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Lionberger v. Rouse 9 Wall. 468, 19 L. ed. 721; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock; and an examination of them shows that in every case the tax was assessed upon the property of the shareholders, and not upon the property of the corporation. * * * (Boldface ours)

Pennsylvania does not require its banks and trust companies to advance the tax. It gives the corporation an option of either (a) collecting the tax from its shareholders or (b) paying the amount from its own funds. If it does not choose to pay the tax, the corporation has the responsibility of collecting it. The exercise of the option by the trust company to pay the tax makes the tax

imposed no less a tax on shares in the hands of the shareholders. The option in the act "is strictly an option of payment not of obligation": NORTHERN TRUST COMPANY v. McCOACH, 215 Fed 991, 994 (1914).

A tax on shares is not a tax on the capital stock property, or franchises of a corporation. It is in no sense a tax on the corporation. It is a personal levy on the shareholders, based on the value of their stock as ascertained by a definite method prescribed in the act of assembly, and without any intent to reach the property that gives the stock its value: NORTHERN TRUST COMPANY v. McCOACH, 215 Fed. 991 (1914); COMMONWEALTH v. UNION TRUST Co., 237 Pa. 353 (1912); COMMONWEALTH v. MORTGAGE TRUST Co., 227 Pa. 163 (1910).

Capital stock represents the property in which it is invested, so is taxable to the corporation which holds title to the property. COMMONWEALTH v. STANDARD OIL Co., 101 Pa. 119 (1882). The shares, on the other hand, are evidences of a right to participate in the profits of a corporation, and, upon its dissolution, to participate in the division of its assets: COMMONWEALTH v. FALL BROOK COAL Co., 156 Pa. 488 (1893); VAN ALLEN v. NOLAN, 70 U. S. 573 (1866). The capital stock and the shares are different subjects of taxation, and are owned by different entities: COMMONWEALTH v. STANDARD OIL Co., supra; WILKES-BARRE DEPOSIT & SAVINGS BANK v. WILKES-BARRE, 148 Pa. 601 (1892); NEILER & WARREN v. KELLY, 69 Pa. 403 (1871); COMMONWEALTH v. CURTIS PUBLISHING Co., 237 Pa. 333 (1912); FARRINGTON v. TENNESSEE, 95 U. S. 686 (1877).

The character of the tax as a levy upon the property of the shareholders was well understood by the legislature, and it was careful that the impost should not fail for violation of any of their constitutional rights. Thus it was provided that notice to shareholders should be given by the posting of notice of assessment in the company's place of business,—this, to afford process of law. It is also provided, as previously mentioned, that the Auditor General (now the Secretary of Revenue) shall give a hearing to any stockholder who wishes to protest the assessment made. These provisions were formerly in the act of 1907 itself, but being matters of procedure, they were later incorporated in section 807 of The Fiscal Code of April 9, 1929, P. L. 343.

If this were a tax on the property of a corporation, then why should the act provide that notice to shareholders should be given by posting of the notice of assessment in the company's place of business? This we believe is done to the end of due process of law.

Consequently, the conclusion of the court below that the tax in question under the act of 1907, as amended by the acts of 1923, 1927 and 1929 is a tax on shares in the hands of the shareholders and is fully supported by the decided cases.

Respectfully submitted,

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BLANK

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SUPREME COURT OF THE UNITED STATES.

No. 447.—October Term, 1937.

Schuylkill Trust Company, Appellant, *vs.* The Commonwealth of Pennsylvania. } Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[January 3, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

In *Schuylkill Trust Company* v. *Pennsylvania*, 296 U. S. 113, we held an act of Pennsylvania[1] invalid as construed and applied in the calculation of the amount of the tax thereby imposed. The statute requires every trust company chartered under the general corporation law to report annually to the Department of Revenue the number of outstanding shares and their actual value at the close of the preceding calendar year. The department is to assess the shares for taxation at five mills upon the dollar. The taxable value of each share is to be ascertained by adding together so much of the amount of paid-in capital stock, surplus, and undivided profits as is not invested in shares of corporations liable to pay or exempted from payment of the Pennsylvania capital stock tax, or relieved from the payment of a tax on shares, and dividing this amount by the number of shares. The company must pay the tax from its general fund within sixty days after assessment, or collect it from the shareholders and pay it over. Provision is made for posting notice of the assessment in the company's office so that shareholders shall be advised of the amount of the assessment and for a hearing of any shareholder who objects to the valuation of the shares.[2]

Securities owned by a trust company may have been purchased out of deposits or from the capital, surplus, and undivided profits. Since securities, the value of which is by the act deductible from the tax base, may have been purchased out of either of the two funds, it is open to the company to prove that they or any of

[1] Act of June 13, 1907, P. L. 640, as amended by the acts of July 11, 1923, P. L. 1071, May 7, 1927, P. L. 853, and April 25, 1929, P. L. 673.

[2] Act of April 9, 1929, Sec. 807, P. L. 393.

them were purchased out of capital, surplus, or undivided profits. Upon such a showing these securities are fully exempt from tax. Where the company has not made this showing the practice in assessing the tax has been to grant a so-called proportionate deduction in respect of such exempt securities.[3] This is accomplished by the use of the following formula: A fraction, the numerator of which is the capital, surplus, and undivided profits at book value less the book value of those investments, if any, for which a full deduction has been made, and the denominator, the book value of the permanent investments, less the book value of those investments, if any, for which a full deduction has been made, is applied to the book value of the securities which are to be apportioned, after adjustment for appreciation or depreciation of those securities, and the resulting sum is deducted from the capital, surplus, and undivided profits. In this manner a portion of the value of each exempted security reflected in the capital, surplus, and profits is deducted before the value per share is determined by dividing the capital surplus and profits so diminished by the number of shares outstanding.

Upon the former appeal it was shown that whereas a proportionate deduction was allowed for shares of Pennsylvania corporations previously taxed, or shares of such corporations exempt from tax, no deduction was accorded in respect of shares of a national bank and bonds of the federal government and its instrumentalities owned by the company. The appellant's position was that the act, though it purported to tax the shares, in fact taxed the net assets of the company which included shares of stock of a national bank and securities of the federal government and its instrumentalities owned by the appellant. An alternative claim was that, if the levy was upon the shares as such, the application of the act worked a discrimination against national bank shares and other federal securities by excluding from the base a proportionate part of the value of shares of certain Pennsylvania corporations while leaving in the base national bank shares and federal securities; and that, if the tax was upon the shares, it was bad as the Commonwealth was without power to tax the shares of nonresident stockholders. The Commonwealth insisted the tax was upon the shares and not upon assets, that the application of the statute involved no dis-

[3] See Commonwealth v. Haselwood Savings & Trust Co., 271 Pa. 375.

crimination against federal securities and that the State had jurisdiction to tax the shares of nonresident shareholders.

We found it unnecessary to determine whether the tax was upon shares or assets. Amongst the assets were shares of national bank stock which had been taxed to the company as owner, pursuant to R. S. 5219 as amended.[4] These we held must be excluded from the base upon which the tax was calculated. We held further that the exclusion from the base of a proportion of the value of tax exempt shares of Pennsylvania corporations, and the refusal of like treatment of federal securities, operated as an unconstitutional discrimination against the latter. We reversed the judgment of the Supreme Court of Pennsylvania and remanded the cause for further procedings not inconsistent with our opinion.

After our mandate went down the Commonwealth moved the trial court to redetermine the tax by disregarding the amendatory statute involved in our decision and reverting to the basic act of June 13, 1907,[5] which was claimed not to be affected by the infirmity of the amendatory act. The appellant insisted that as we had set aside the judgment and held the amendatory act of April 25, 1929,[6] invalid as construed and applied, the only action open to the trial court was the entry of a judgment for the appellant. The court refused to follow either of the suggested courses, holding that the legislature, by the act of 1929, intended to exercise only such power as it lawfully possessed and did not attempt to impose a tax upon securities exempted by federal law. It found that the purpose of the statute could be accomplished by eliminating the national bank shares from the tax base and by treating the other federal securities in the same manner as tax exempt stock of state corporations. It accordingly recalculated the tax. The appellant took the case to the Supreme Court of the Commonwealth which affirmed the judgment.[7]

By appropriate exceptions and assignments of error the appellant challenges the new judgment upon these grounds: that the courts below have disregarded the mandate of this court and have exceeded their powers in reassessing the tax; that the tax is one upon assets and not upon shares, and federal securities are left in

[4] U. S. C. Title 12, § 548.
[5] *Supra*, Note 1.
[6] *Supra*, Note 1.
[7] 327 Pa. 127.

the tax base as to at least a portion of their value; that, if the tax is upon the shares rather than upon the assets, there is still a discrimination against federal securities because the stockholders of appellant and other similar corporations are wholly exempted from any tax calculated upon the value of the shares of national banks whereas at least a portion of the value of other federal securities still remains in the tax base; and that, in any event, the impost is bad so far as it is laid upon the shares of nonresident shareholders. The Commonwealth argues that the tax is upon the shares as such and not upon assets; that in assessing it no discrimination is practiced against federal securities and in favor of the exempted stock of Pennsylvania corporations and that, if the tax is otherwise valid, the fact that it is laid upon all shareholders, including nonresidents, does not void it as respects the latter.

First. When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not inconsistent with our opinion. It is clear that the State courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax.

Second. The contention that the State courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act.

Third. As the case is now presented, we find it necessary to determine whether the tax is upon the shares as such or upon the capital, surplus, and profits of the company. The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The state courts, and the local federal court, have held the imposition a tax upon the shares.[8] The history

[8] Schuylkill Trust Co. *v.* Commonwealth, 315 Pa. 429; Commonwealth *v.* Mortgage Trust Co., 227 Pa. 163, 174; Commonwealth *v.* Union Trust Co., 237 Pa. 353, 355; Northern Trust Co. *v.* McCoach, 215 Fed. 991.

of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion.[9] We are of opinion that the tax is one upon the shares as such and not upon the assets of the company.

Fourth. The State need not have made any exemption or concession in taxing the property in the shares on account of value therein reflected from the company's ownership of obligations of the government or its instrumentalities other than national bank stock.[10] And the discrimination found upon the earlier appeal in failing to accord proportionate exemption to federal securities similar to that extended to exempt shares of domestic corporations has been removed, for all are now accorded like treatment by way of deduction.

Fifth. The fact that the shareholders of a trust company whose investments consist of national bank stock would pay no tax, because R. S. 5219 permits but a single tax thereon which has been paid by the company as owner, whereas those holding shares in a trust company which owns only other federal securities would not

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[9] As early as 1867 [Act of April 12, 1867, P. L. 74] Pennsylvania imposed a tax on the shares of national bank stock in the hands of the holders. See also Act of April 2, 1868, P. L. 55; Act of May 1, 1868, P. L. 108, Sec. 10. It also taxed the shares of state banks. Act of December 22, 1869, P. L. [1870] 1373; Act of June 10, 1881, P. L. 99; Act of June 30, 1885, P. L. 193; Act of June 8, 1891, P. L. 229, (the last named act was sustained in Commonwealth *v.* Merchants & Manufacturers National Bank, 168 Pa. 309; affirmed 167 U. S. 461); Act of July 15, 1897, P. L. 292, amended by Act of May 2, 1925, P. L. 497, and Act of April 25, 1929, P. L. 677. Some of the earlier of these acts provided for the taxation of the shares of trust companies upon the same basis as shares of banks were taxed, but by the Act of June 1, 1889, P. L. 420, trust companies were made liable for a so-called capital stock tax which is in fact a tax upon assets and no tax was levied upon the shares in such companies. The Act of 1907 (*supra*, note 1) was passed in order to conform taxation applicable to trust companies with that then current with respect to banks. As stated in Commonwealth *v.* Mortgage Trust Company, 227 Pa. 163, 175: "The policy of the commonwealth for more than twenty years was to tax the capital stock of these companies in the same manner as other corporations created under the general corporation act of 1874 were taxed . . . . This method of taxing the capital stock of these institutions continued in force until the act of 1907 was passed. As the trust company business grew in magnitude . . . the question of the proper method of taxing the capital stock of these corporations frequently arose. It was contended in their behalf that banks were their natural competitors; that their business partook of the nature of banking; and that they should be taxed in like manner. As a result of this feeling and the agitation which followed it the act of 1907 was passed. It is apparent that the legislature intended to tax trust companies on the same basis as banks."

[10] Van Allen *v.* The Assessors, 3 Wall. 573; National Bank *v.* Commonwealth, 9 Wall. 353, 359; Cleveland Trust Co. *v.* Lander, 184 U. S. 111; Des Moines National Bank *v.* Fairweather, 263 U. S. 103.

be entitled to a similar total exemption but only to a proportionate deduction unless it could be shown that those securities were purchased from capital, surplus, and undivided profits, does not evidence an illegal discrimination against such securities. The inability of a state to measure a tax by certain assets exempted by federal law does not preclude it from reckoning in the tax base all those it can reach. And the principle of equal protection does not demand that because one company owns wholly exempt securities, with consequent exemption of its shareholders from the exaction, the state shall abstain from taxing the shareholders of another company whose investments carry no such exemption.

Sixth. The State courts have held that nonresident as well as resident shareholders are within the scope of the statute, and we are bound by this construction. The appellant argues that as thus applied the statute would take their property without due process and deny them equal protection in violation of the Fourteenth Amendment of the Constitution of the United States since the taxing power of Pennsylvania is limited to persons and property within her jurisdiction. The contention was overruled by the State Supreme Court, and we think rightly so, upon the authority of *Corry* v. *Baltimore*, 196 U. S. 466. There this court held that under a similar statute Maryland and its municipal subdivisions could impose a levy for revenue upon nonresident shareholders measured by the value of their shares in a domestic corporation. The distinctions between that case and this, to which the appellant points, are not significant. In reliance upon *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, wherein we held it competent for the United States to provide by a statute which became part of the charter of every national bank that the shares shall be taxable to the shareholders by the state wherein the bank is located, the court proceeded, in the *Corry* case, to the proposition that where a state statute made similar provision for the taxation of the shares of nonresident stockholders at the home of a domestic corporation, the legislation did not violate the Fourteenth Amendment.[11] There the corporation was made liable for the payment of the tax and given a right of reimbursement over against

[11] The case has been cited repeatedly with approval. Covington v. First National Bank, 198 U. S. 100, 112; Hawley v. Malden, 232 U. S. 1, 12; Rogers v. Hennepin County, 240 U. S. 184, 191; Rhode Island Trust Co. v. Doughton, 270 U. S. 69, 81.